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[*For the Names of the Barristers contributing the Notes, see page* 1.]

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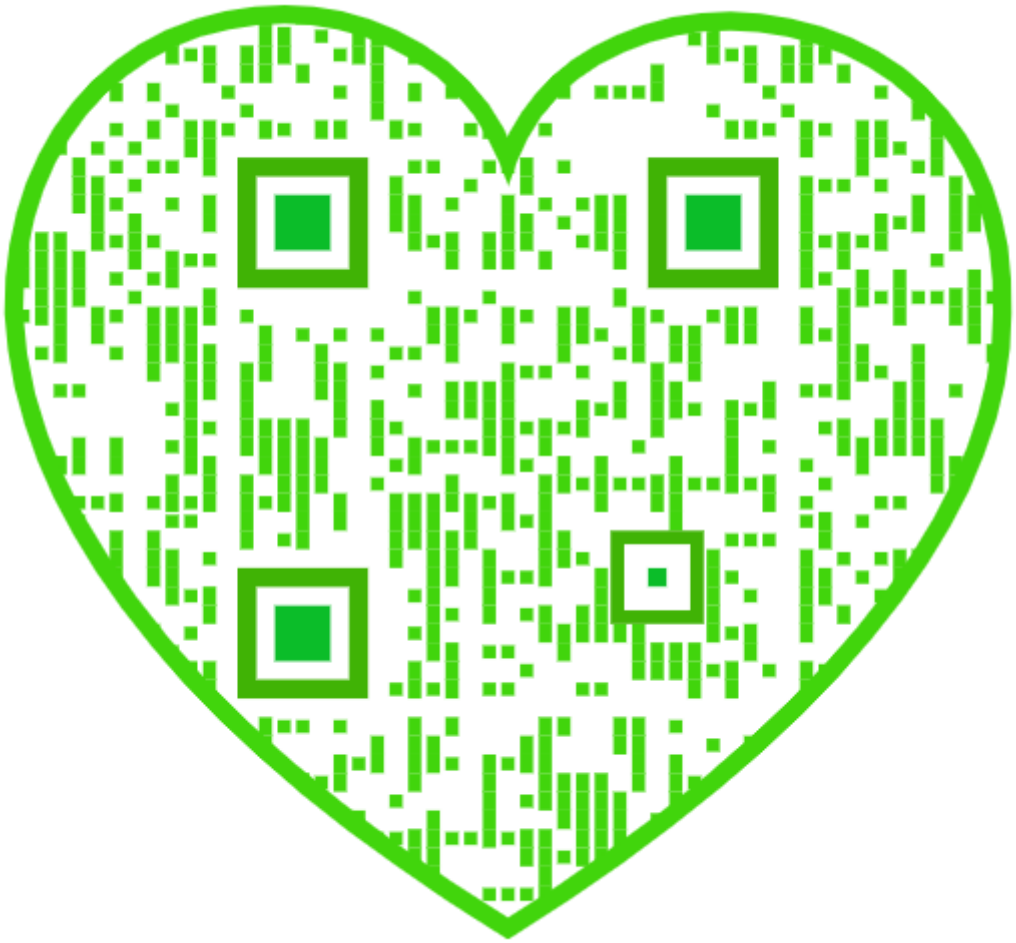

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THE LAW JOURNAL;

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House of Lords.

EDMUND STORY MASKELYNE, Barrister-at-Law.

Privy Council.

EDWARD BULLOCK, Barrister-at-Law.

Exchequer Chamber.

These Cases are reported by the Barristers who have reported the Cases in the respective Courts from which the Errors and Appeals come.

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CHARLES EDWARD HAWKINS, Barrister-at-Law.

Court of Appeal in Chancery (Lords Justices).

WILLIAM STEBBING and EDWARD ALFRED HADLEY, Barristers-at-Law.

Rolls' Court.

DAVID PITCAIRN and EDWARD GILBERT HERBERT, Barristers-at-Law.

Court of the First Vice-Chancellor.

HENRY ROBERT YOUNG and WILLIAM WORSLEY KNOX, Barristers-at-Law.

Court of the Second Vice-Chancellor.

HENRY LUDLOW and EDWARD THURSTON HOLLAND, Barristers-at-Law.

Court of the Third Vice-Chancellor.

FREDERICK WHITTING and GEORGE TUTHILL BORRETT, Barristers-at-Law.

Court of Appeal in Bankruptcy.

CHARLES EDWARD HAWKINS, Barrister-at-Law.

Court of Admiralty.

ROBERT ALBION PRITCHARD, D.C.L., Barrister-at-Law.

Probate Court and Divorce and Matrimonial Court.

GEORGE HENRY COOPER and GEORGE CALLAGHAN, Barristers-at-Law.

Ecclesiastical Courts.

GEORGE CALLAGHAN, Barrister-at-Law.

Queen's Bench.

ROBERT SAWYER and ARTHUR PAUL STONE, Barristers-at-Law.

Common Pleas.

WILLIAM PATERSON and GILMORE EVANS, Barristers-at-Law.

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Courts of Equity.

LORD HATHERLEY, L.C.
Jan. 11.

THE ATTORNEY-GENERAL *v.* THE ELY, HADDENHAM, AND SUTTON RAILWAY COMPANY.

Railway—Highway—Obstruction—Diversion.

The MASTER OF THE ROLLS having dismissed the information in this case (see 3 Notes of Cases, 167; 37 Law J. Rep. (N.S.), Chanc. 822), the relators appealed.

Mr. Jessel and *Mr. G. N. Colt* appeared for the appellants, and

Sir Richard Baggallay and *Mr. Dryden* for the respondents.

The information was filed at the relation of ten inhabitants of Thetford, in the Isle of Ely, who had property in Grunty Fen, to restrain the company from obstructing and diverting a public road leading from Thetford to Grunty Fen. The public road crossed the turnpike road from Ely through Streatham to Cambridge, not, however, crossing it directly, but for a short distance coinciding with it. The portion common to the two roads was within the limits of deviation of the company's line; and the company were, by their special Act, authorised to cross the turnpike road on the level within those limits. The company thereupon made two level crossings—the first where the public road joined the turnpike road, and the second near the spot where it left it. The Board of Trade, however, would not sanction two level crossings, and the company then diverted the public road in such a manner, that it only became necessary to cross it once—*i.e.*, at the second of the above-mentioned crossings, and they blocked up the first mentioned crossing and diverted the road, leading it by the side of the railway down to the second crossing and then across the line, thence it returned along the other side of the railway till it rejoined the untouched portion of the highway. The relators complained that this added 130 yards to the distance and made two sharp turns; and they contended either that the one level crossing sanctioned by the Board of Trade should be placed where the first level crossing had formerly been, or that the highway should be carried across at that point by a bridge or tunnel.

The MASTER OF THE ROLLS thought that to go round by the present road would be less troublesome than to cross over the railway in a straight line by a bridge, or under it by a tunnel; and although the diversion might be *ultra vires*, it was more convenient for the public than any course that could be adopted *intra vires*, and the Court would not compel the company to take a course inconvenient to the public. He therefore dismissed the information, but without costs.

The LORD CHANCELLOR, after a careful consideration of the various sections of the Railways Clauses Act, came to the conclusion that its provisions had been fairly complied with, and dismissed the appeal with costs.

LORDS JUSTICES. Jan. 11. — *In re* THE ACCIDENTAL AND MARINE INSURANCE CORPORATION (LIMITED). *Ex parte* BRIDGER AND OTHERS.

Company—Past Member—Liability of Transferor of Shares which are Forfeited after the Transfer.

These were several appeals from orders made by Vice-Chancellor STUART, in cases involving similar facts, which were of the following character:—The appellants were originally shareholders in the corporation, holding shares of the nominal amount of 25*l.*, upon each of which they had paid 5*l.* In the year 1866 they sold their shares. Afterwards two calls were made of 5*l.* each, one payable in March and the other in July 1866. These calls were not paid by the purchaser of the shares. On October 3, 1866, all the shares in question were forfeited. On October 4 a resolution was passed to wind-up voluntarily, which was, under an order of the Court of November 3, continued under supervision.

The liquidator under these circumstances sought to place the appellants upon the list of contributories as past members, which His HONOUR held was proper to be done.

Sir Roundell Palmer, *Mr. Dickinson*, and *Mr. Everitt* appeared for the appellant Bridger.

Mr. Maule and *Mr. Fischer* appeared for another appellant.

Mr. Hardy and *Mr. Higgins* appeared for the liquidator, but were not called upon.

Their LORDSHIPS held that the appellants were properly placed upon the list of contributories as past members, although the present was not the occasion to decide what would ultimately turn out to be their actual pecuniary liability.

LORD ROMILLY, M.R. Dec. 5, Jan. 11. — *Re* BROWN'S ESTATES.

Covenant to Settle after Acquired Property—Increase in Present Property.

A question arose on this petition, whether the increase of value of an interest in certain tontine bonds, on account of the death of members of the tontine, was to be considered after acquired property, within the meaning of covenants in certain marriage settlements.

Mr. Jessel and *Mr. Cookson* for the petition.

Mr. Gregory for trustees of the fund.

Mr. Eddis for the trustees of the settlements.

Jan. 11.—The MASTER OF THE ROLLS decided that the property in dispute was not included in the settlements.

LORDS JUSTICES. Jan. 11. — *In re* THE ANGLO-GREEK STEAM NAVIGATION AND TRADING CO. (LIM.). *Ex parte* CARRALLI AND ANOTHER.

Set-off—Mutual Credit—Bankrupt Law Consolidation Act, 1849, *s.* 171.

This was an appeal by the official liquidator of this company against an order of the MASTER OF THE ROLLS, allowing a claim on the part of Mr. Carralli and his co-trustee, under a deed of assignment made by one Mavrocordato for the benefit of his creditors.

The claim was founded upon three bills for 500*l.* each, which had been accepted by the company in favour of Mavrocordato. These bills had been indorsed by Mavrocordato to Messrs. Papaganni Brothers for collection, who afterwards indorsed them to Mr. Carralli and his co-trustee.

The official liquidator resisted payment of the bills, on the ground that Mr. Mavrocordato was a holder of 800 shares in the company, the calls upon which greatly exceeded the amount of the bills.

Mr. Southgate, *Mr. Bagshawe*, and *Mr. Bush* for the appellant.

Mr. Roxburgh and *Mr. Bedwell* for the respondent.

Their LORDSHIPS held that the mutual credit clause of the Bankrupt Law Consolidation Act, 1849, applied, and that the proof upon the bills could not therefore be sustained.

LORDS JUSTICES. Jan. 13. — LANGTON *v.* WAITE.

Pleading—Offer by Plaintiff made in Bill—Practice.

This was an appeal from the decree of MALINS, V.C., reported 37 Law J. Rep. Chanc. 345, and also from an order made by His HONOUR on a petition presented by the plaintiff on July 30, 1868. By the decree the plaintiff was declared entitled to receive what should appear to be the balance upon taking certain accounts, but he was to re-transfer a certain sum of 22,000*l.* stock of the Grand Central Railway of Canada, which had been transferred to him by the defendant. This re-transfer, both in the body and in the prayer of the bill, the plaintiff offered to make. After the decree was made, it appeared that the plaintiff had some time previously, but after filing the bill, sold the stock in question, and therefore he could not comply with the terms of the decree. He then presented the petition, asking that he should be allowed to transfer other similar stock (to be obtained in the market), or to account to the defendant for the price he had received. On this petition the VICE-CHANCELLOR made an order in accordance with the plaintiff's wish. Hence the appeal.

Sir R. Palmer, *Mr. J. Pearson*, and *Mr. Curry* for the appellant.

Mr. Cotton and *Mr. Morris* for the respondent.

Their LORDSHIPS held that the state of the pleadings was such that no decree could have been made in favour of the plaintiff without ordering him to re-transfer the stock. This he had, before the hearing of the suit, put it out of his power to do. The order on the petition was inconsistent with the decree, and was made by the VICE-CHANCELLOR *ultra vires*. The petition, therefore, ought to have been dismissed with costs, and this must be done now. As to the decree, the whole of the facts being before their LORDSHIPS, whatever might be their opinion upon the merits of the original contention between the parties (as to which they gave no judgment), since no decree could be made in favour of the plaintiff, the bill must now be dismissed with costs; but as their LORDSHIPS thought that plaintiff, in selling the stock, had not intended to deal fraudulently, they made the present order without prejudice to his filing a new bill, should he feel so disposed.

Courts of Common Law.

Common Pleas. Jan. 12. } BEALE AND OTHERS *v.* SMITH.

Election Petition—Form of Petition—Particulars.

This was an election petition against the defendant, who had been elected parliamentary representative for Westminster. The petition generally alleged that he and his agents had been guilty of bribery, &c.; and WILLES, J. had ordered that particulars should be given (three days before trial) of the persons bribed, &c., but not of those who had bribed, &c.

Hawkins now moved for a rule to show cause why the petition should not be taken off the file, because it did not state the facts, and why particulars should not be given of the persons who bribed, &c.

The COURT refused the rule, thinking that the petition was good in form, and that there was nothing to show that the judge had wrongly exercised his discretion as to particulars.

Rule refused.

Common Pleas. Jan. 12. } HEMMANS *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Acceptance of Railway Shares.

The plaintiff having recovered judgment against the Chichester and Midhurst Railway Company, obtained a *scire facias* against the defendants as shareholders. At the trial it appeared that, the defendants having power to subscribe, shares were allotted to certain directors, who executed transfers to the defendants, who paid calls and recognised the transaction in every way except by accepting the transfer by deed, and were on the register. A verdict was found for the plaintiff, with leave to the defendants to move to enter it for themselves if a transfer by deed were necessary.

Pollock moved accordingly.

The COURT thought a transfer by deed unnecessary, and refused the rule.

Rule refused.

Common Pleas. Jan. 12. } JACKSON *v.* SLIPPER.

Promissory Note—Drawer or Indorser—Non-Negotiable Instrument.

The plaintiff, as payee, brought an action against the defendant as maker of a promissory note. The note was, 'I promise to pay Jackson,' and it was signed on its face by one Pfeiffer; but on the back were the names of Pfeiffer and the defendant. The plaintiff at the trial merely produced the note, proved the handwriting, and submitted that the defendant must be taken to be the maker of a non-negotiable note. The plaintiff was nonsuited, with leave to move to enter the verdict for himself.

Joyce now moved.

The COURT refused the rule, thinking that on the evidence produced the defendant must be taken to be indorsee of a non-negotiable instrument.

Rule refused.

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LORD ROMILLY, M.R. Jan. 15. } JOHNSON *v.* LANDER.

Judicial Separation—20 & 21 Vict. c. 85, s. 25—Right of Wife to Personalty not reduced into Possession.

On the death of a tenant for life entitled to income, a share of a settled fund became payable to a married woman. The tenant for life died on March 18, 1867, and the married woman obtained a decree for judicial separation on February 7, 1868. The share not having been reduced into possession, the question was whether the married woman could claim it absolutely.

Mr. Bristowe appeared for the married woman.

Mr. Archibald Smith for persons not interested in this question.

Mr. Jervis, for the husband, argued that the language of the statute 20 & 21 Vict. c. 85, s. 25, did not vest the share in the wife.

The MASTER OF THE ROLLS held that it belonged to her absolutely.

LORD ROMILLY, M.R. Dec. 14, Jan. 12. } HOPE LIFE ASSURANCE AND GUARANTEE SOCIETY *v.* EDWARDS.

Judgment at Law—Fraud—Notice to Assignee of Judgment.

In 1855 the plaintiff society sold its business to the Mitre Company, which thereupon assumed the liabilities of the society. Shortly afterwards an action was brought against the society by a Mr. Schlapfer, on one of their policies for 1,000*l.*, and this action the Mitre Company, in conformity with the terms of the sale, undertook to defend. The case, however, was compromised by the Mitre Company, who authorised their chairman, Mr.

Strousberg, to settle Mr. Schlapfer's claim by paying him 700*l.* This was done, but Mr. Strousberg, instead of having satisfaction entered up on Mr. Schlapfer's judgment, took an assignment of it, and afterwards sold it to his solicitor, the present defendant Edwards, who was not cognisant of the fraud. The bill was filed to try the question whether Edwards could, under these circumstances, enforce the judgment against the society.

Mr. Jessel and *Mr. Hemming* for the plaintiffs.

Mr. Southgate, *Mr. Cracknell*, and *Mr. Edwards* for the defendant Edwards.

Mr. Kekewich for another defendant, a trustee for Edwards.

The MASTER OF THE ROLLS held, that since it was not proved that the judgment had been obtained by fraud known to the defendant Edwards when he acquired it, he could not prevent him from enforcing it, and dismissed the bill with costs.

LORD ROMILLY, M.R. Jan. 11, 12, 15. } SWEBY *v.* SMITH.

Tender under Protest.

One of the objects of this suit was to obtain a declaration that an alleged forfeiture of shares in Spence's Patent Composition Company was void. The question depended on whether the plaintiff had made a proper tender of the amount of calls made on him. He had sent a cheque for the amount to this company, together with a letter of protest against the validity of the call, as having been made to pay for a patent the validity of which the plaintiff denied. The letter also contained the following words: 'I request that you will enter this my protest in the records of the company; and, further, that this money be held in trust by the directors, each of whom I shall hold responsible for repayment of the same until the question of the vendor's patent rights has been settled.'

The defendants contended that the tender of payment of the amount of calls had been made conditionally only.

Mr. Southgate and *Mr. Makeson* for the plaintiff.

Mr. De Gex, *Mr. Bowring*, *Sir R. Baggallay* and *Mr. Horton Smith*, *Mr. Roxburgh* and *Mr. Rudolph*, *Mr. Jessel* and *Mr. S. Thompson*, and *Mr. Freeling* for the various defendants.

Jan. 15.—The MASTER OF THE ROLLS said that a good tender under protest had been made, and the forfeiture was therefore void.

LORD ROMILLY, M.R. Jan. 18. } *Re* CHINA STEAMSHIP COMPANY (LIMITED.) *Ex parte* DRUMMOND.

Companies Act, 1862, *s.* 23—*Contract to take Shares—Memorandum of Association.*

Upon the formation of the China Steamship Company the business and assets of the Labuan Coal Company were handed over to it, and paid-up shares in the new company were issued in consideration of this to the shareholders of the old company.

Mr. Drummond had subscribed to the memorandum of association of the new company in respect of 25 shares. He was a shareholder in the old company, and in respect of his shares in it he received 5479 shares in the new company. The new company being wound up, he was placed on the list of contributories in respect of the 25 shares for which he had subscribed; he now applied by summons to have his name removed from the list of contributories, on the ground that the allotment of the paid-up shares satisfied his contract to take the 25 shares.

Mr. Jessel and *Mr. Speed* for Drummond.

Mr. Roxburgh and *Mr. Wickens*, for the official liquidator, were not called on.

The MASTER OF THE ROLLS said the case was concluded by *Migotti's Case*, 36 Law J. Rep. (N.S.) Chanc. 351, and Mr. Drummond had been rightly placed on the list of contributories.

LORD ROMILLY, M.R. Dec. 15, 16. } DRAX *v.* SOMERSET AND DORSET RAILWAY CO.

Pleading—Parties—Suit by Unpaid Vendor—Debenture Holder.

In this suit by an unpaid vendor against a railway company, the question was raised whether debenture holders, who in another cause had obtained a receiver, were properly made parties.

Mr. Langley, for the debenture holders, suggested that they were not, not being parties to the contract, specific performance of which was prayed by the bill.

Mr. Fry cited *Bishop of Winchester* v. *Midland and Hants Railway Co.*, 5 Law J. Rep. Eq. 17.

Dec. 16.—The MASTER OF THE ROLLS, following the case cited, held that they were necessary parties.

MALINS, V.C. Jan. 16. } *Re* BEASNEY'S TRUSTS.

Presumption of Death—Evidence of Particular Time.

The question raised in this petition was whether William Beasney, who was last heard of on August 12, 1860, could be presumed to have died before November 14 in that year, in which case the petitioner would be entitled to a fund of 1,000*l.*, in which the deceased had a life interest. The evidence went to show that Beasney was a man of loose and drunken habits, supported chiefly by the assistance of his relations; but that he always looked forward to the regular half-yearly payment of the dividends on the fund in question, and punctually applied for the same, squandering the money in drink as soon as he received it; that he received his last payment in April 1860, but that no application was ever made by him or on his behalf for the October or any subsequent dividend; that when he was last seen in August of that year, he was in a miserably emaciated condition, poorly clad, and suffering from severe pulmonary disease.

Under these circumstances the Court was asked to presume that his death took place before Nov. 14, 1860.

Mr. Glasse and *Mr. Daly* for the petition.

Mr. G. O. Morgan for parties entitled in the event of his having survived that day.

MALINS, V.C. thought that the non-application by the deceased for his October dividends in 1860, taken in conjunction with the other circumstances of the case, was sufficient evidence of his having died before the day in question, and made an order accordingly.

MALINS, V.C. Jan. 18. } TURNOR *v.* CLOWES.

Specific Performance—Lessor and Lessee—Right of Sporting—Deed under Seal—Damages

This was a suit to enforce the execution of a draft lease, and consequent thereon to obtain from the lessors damages for breach of the covenants in the lease for quiet enjoyment of the rights conferred thereby, and in particular the right of shooting.

The agreement for the lease comprised a house and premises of which the lessee was to have possession (in respect of which no complaint was now made), and also the right of sporting over 800 acres of land not comprised in the lease. The term for which the lease was to be granted was seven years from March 25, 1861, which term consequently expired in March 1868; but the plaintiff's case was that his shooting had been destroyed in 1866 and 1867 by the cutting down of the covers on the land over which he had the shooting, and for which he could have had damages at law, but for the fact that this right was only recognised at law when conferred by deed under seal. The plaintiff therefore came into equity to insist upon the execution of a lease, which would have enabled him to proceed for his damages at law, asking the Court to give him those damages which, if he had had such a lease, he might have obtained at law.

The bill was filed in 1867, and asked an injunction to restrain the lessor and his under-tenants from cutting down the covers or otherwise interfering with the shooting, but no interlocutory application for an injunction was ever made, and the cause was now brought to a hearing.

Mr. Cotton and *Mr. Holmes* for the plaintiff.

Mr. Pearson and *Mr. Wood*, and *Mr. Glasse* and *Mr. London* for the tenant for life and his mortgagees, who all concurred in the agreement for the lease.

The VICE-CHANCELLOR said that the cause ought not to have been brought to a hearing. The term having now expired, it would be absurd to compel the defendants to go through the formal ceremony of granting a lease. But, above all, there was no allegation that the property had not been managed in a proper and husbandlike manner, and it could not be supposed that a man who lets his shooting for a small consideration thereby ties up his hand against the due cultivating of his estate. If the covers or crops are not to be interfered with by the lessor, there must be an express contract to that effect. Had the plaintiff made an interlocutory application in the usual way, the matter might have been disposed of then; and the bill must now be dismissed with costs.

MALINS, V.C. June 9, 10, 11, 12, Dec. 22. } ATTORNEY-GENERAL *v.* EARL OF LONSDALE.

Riparian Owners—Navigable River—Obstruction, Injunction to Prevent.

This was a bill and information filed by and at the relation of Mr. Mounsey against the Earl of Lonsdale, to restrain the Earl from constructing a jetty into the bed of the river Eden, near its entrance to the Solway Frith. The plaintiff, who was the opposite owner, alleged both public and private injury, the one by the obstruction that would be caused to the navigation of the river, the other by the diversion of the stream from its natural channel, and the consequent washing away of the soil from his own shore.

The Eden is a tidal river, but of late years the navigation has been almost entirely superseded by the introduction of railways and other local causes. A vast amount of very conflicting scientific and other evidence as to the probable effect of the defendant's works was produced on both sides.

Sir R. Palmer, *Mr. Glasse*, and *Mr. Mounsey* appeared for the plaintiff.

Mr. Jessel and *Mr. Davey* for the defendant.

Mr. Wickens for the Attorney-General.

MALINS, V.C. thought that the evidence failed to sustain the allegation of private injury; but the plaintiff and defendant being opposite riparian owners, it was not competent for the one to encroach upon the bed of the river without the consent of the other. With regard to the public injury, although it might, as a matter of fact, be very trifling, in consequence of the decrease of traffic, yet the Court was bound to protect the rights of the public in the navigation of the river. The injunction must, therefore, be granted, with costs.

JAMES, V.C. Jan. 13. } KETTLEWELL *v.* BARSTOW.

Pleading—Demurrer—Equitable Ejectment—Simple Allegation that Plaintiff is 'Heir-at-Law.'

Demurrers by two defendants to the bill.

The plaintiff claimed to be entitled, as heir-at-law of Ann Fawcett, to certain real and copyhold estates of and to which the said Ann Fawcett was seized and equitably entitled at her death, and which the defendants were alleged to have wrongfully claimed and obtained possession of under an alleged will of one Elizabeth Barstow, Ann Fawcett's sister. The plaintiff did not set out his pedigree, or in any way trace his relationship to the said Ann Fawcett, but merely stated that he was her heir-at-law, and entitled thereto. The plaintiff further alleged that he had commenced actions of ejectment to recover some portions of the estate, but some other portions thereof were small and detached, and lying in different parishes, and he had been unable to discover the particulars thereof, or to bring actions of ejectment for the recovery thereof without the discovery sought by the bill. The prayer of the bill was for a declaration that the defendant, William Fawcett, had obtained admission to the aforesaid copyholds by a fraudulent representation that he was heir-at-law of Ann Fawcett, and that the same defendant might be decreed to deliver the possession thereof to the plaintiff, and to discover all deeds and documents relating to the estates of, or to which Ann Fawcett was seized or entitled at her death, and that the same title deeds might be brought for safe custody into Court and used by plaintiff in his actions of ejectment; that defendants might discover in whom all the estates comprised in a certain settlement under which Ann Fawcett was entitled were now vested; that on plaintiff establishing his title to such estates, the title deeds might be delivered over to him and for an account and receiver. The defendants demurred for want of equity.

Mr. Russell Roberts on behalf of the defendant William Fawcett, and

Mr. Wickens, for the defendant J. M. Barstow, supported the demurrers.

Mr. Kay and *Mr. Cottrell* in support of the bill.

JAMES, V.C., said the bill was in the nature of a suit of equitable ejectment so far as regarded the equitable estates. The pleading point, whether a simple allegation that the plaintiff was heir-at-law was sufficient to maintain the bill, had been discussed and decided in *Barrs v. Fewkes*, 2 H. & M. 60; 33 Law J. Rep. Chanc. 484. He should follow that case in overruling the demurrers, and in making the costs costs in the cause.

Courts of Common Law.

Queen's Bench. Jan. 15. } SHEPHERD *v.* HARRISON AND ANOTHER.

Principal and Agent—Vesting of Property in Goods—Bill of Lading and Bill of Exchange forwarded together.

In this case, Paton, Nash, & Co. (hereinafter called the consignors) were merchants at Pernambuco, and George Paton & Co. (hereinafter called the Liverpool House) were their correspondents at Liverpool. The plaintiff wrote to the consignors requesting them to buy 1,000 bales of cotton on his account at a certain price, including cost, freight, and insurance. The consignors purchased and shipped 747 bales, and wrote advising the plaintiff of the shipment, and that they should draw upon him on forwarding bills of lading. They sent him a second letter, enclosing invoices of the 747 bales, headed 'on account and risk of S. & Co.' (the plaintiff), and saying, 'We have drawn upon you as per note at foot for the same, for which we beg your protection.' The bills of lading for these bales were forwarded by the consignors to their Liverpool house, with two bills of exchange for the price, and the Liverpool house forwarded them to the plaintiff in a letter, saying, 'We enclose bills on yourselves, to which please do the needful, and return to us in course.' The plaintiff returned the bills accepted, but protesting that part of the cotton had not been bought according to his instructions. A correspondence followed on the subject, but the plaintiff paid the bills at maturity. The consignors then shipped 200 other bales, and wrote to the plaintiff, enclosing an invoice 'on account and risk of S. & Co.' (the plaintiff), and saying that they had drawn upon him for the amount, and stating that they enclosed the bill of lading. But the bill of lading, which made the cotton deliverable to the consignors' 'order or assigns,' was forwarded, indorsed in blank, to the Liverpool house, with a draft on the plaintiff for the price. The Liverpool house forwarded the bill of lading to the plaintiff, together with the draft, for which they 'begged his protection.' The plaintiff refused to accept this draft, on the ground that his order had not been complied with, and ultimately brought trover for the 200 bales.

Quain (*Jordan* with him), for the plaintiff, contended that the property in the cotton had passed to the plaintiff, and that his acceptance of the bill of exchange was not a condition precedent to his right to receive the cotton.

Holker for the consignors (who had indemnified the defendants).

The COURT (COCKBURN, C.J., MELLOR, J., HANNEN, J., and HAYES, J.) held that, looking at all the facts of the case, it must be inferred that the consignors intended that the delivery of the bill of lading to the plaintiff and his acceptance of the bill of exchange should be simultaneous. The property in the cotton had therefore never passed to the plaintiff.

Judgment for the defendants.

Queen's Bench. (*Magistrate's Case*). Jan. 20. } PALMER'S SHIP-BUILDING AND IRON CO. (LIM. AND REDUCED) (APPELLANTS), CHAYTOR (RESPONDENT).

Factory Acts, 7 & 8 *Vict. c.* 15—13 & 14 *Vict. c.* 54—16 & 17 *Vict. c.* 104—30 & 31 *Vict. c.* 103—*Factory—Article of Metal—Child.*

Case stated by Justices under 20 & 21 Vict. c. 43.

The respondent had laid an information against the appellants, in which it was alleged that they had offended against the provisions of the 30 & 31 Vict. c. 103, and the statutes incorporated therewith, 7 & 8 Vict. c. 15; 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104, in that they being the occupiers of a certain ship-building factory, being a factory within the meaning of such statute, did employ in their said factory a certain child, named Smith Kennedy, under the age of eleven years, six and a half hours per day. The evidence given before the justices showed that the company carry on works comprising the business of blast furnaces, iron rolling-mills, engine buildings, and iron ship-building in all its branches. The whole of the works are within one common boundary. Steam machinery is used for the purposes of the company, and in each department more

than fifty persons are employed. Smith Kennedy was employed as a rivet boy. In the department in which he worked, steam machinery was in use for cutting and shaping iron plates, and rivets were heated there.

The admissions of the appellants withdrew from the consideration of the justices all questions except whether the premises of the appellants were a factory; and the said justices found that they were a factory within the statutes, and that articles of metal had been made there by steam power, and they thereupon convicted the appellants.

Mellish (*Beresford* with him) for the appellants.

The *Attorney-General* (*Sir R. P. Collier*), (the *Solicitor-General* (*Sir J. D. Coleridge*) and *Archibald* with him) for the respondent.

Per Curiam (COCKBURN, C.J. and HAYES, J.).—It is quite clear that these premises were a 'factory' within the meaning of 30 and 31 Vict. c. 103, which, by section 3, defines 'factory' to mean, *inter alia*, 'any premises in which steam, water, or other mechanical power is used for moving machinery employed in the manufacture of any article of metal, not being machinery.' The justices were therefore right.

Conviction affirmed.

Exchequer. Jan. 13, 14. } HARDING *v.* INSKIP.

Bankruptcy Act, 1861, *s.* 198—*Stay of Execution—Setting aside Writ—Deed of Release and Composition—Jurisdiction of the Court.*

F. M. White moved in this case, on Jan. 13, to set aside the writ of *fi. fa.*, which had been issued, and to stay all further proceedings by way of execution, on the ground that the defendant had executed a deed of composition and release, which he had had no reasonable opportunity of pleading in the action.

It appeared that nothing had been done in the way of executing the writ, it having been agreed that the sheriff should hold his hand pending this application.

The COURT were of opinion, however, that inasmuch as the Bankruptcy Act, 1861, s. 198, only forbade process being made available without leave of the Court of Bankruptcy, and no attempt had been made to make process available in the present case, they ought not to interfere, unless some authority could be shown for such a course.

On the following day, January 14, *F. M. White* called the attention of the Court to the case of *Sadler* v. *Cleaver*, 7 Bing. 769.

The COURT, however, were of opinion that the provisions of the statute, 6 Geo. IV. c. 16, on which that case was decided, were not analogous to those of section 198, and therefore refused the rule.

Rule refused.

Common Pleas. Jan. 15. { SAXBY *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Watercourse—Obstruction—Liability of Owner of Land for Wrongful Act of Strangers—Evidence.

This was an action for obstructing and diverting the flow of water to the print works of the plaintiff. The action was tried before CHANNELL, B. at Chester, at the last Spring Assizes, when that learned judge nonsuited the plaintiff, on the ground that there was no evidence that the defendants had obstructed or diverted the flow of the stream as complained of; and the question which came before the Court on a rule *nisi* to set aside such nonsuit was, whether there was any such evidence or not. It appeared that the bed or soil of the stream, the right of flow of water from which the plaintiff claimed, belonged to the defendants, but that the obstruction which had diverted such flow from the plaintiff's works had been caused by a third party (a riparian proprietor), who had placed a plank in the stream to keep back the water for the use of certain mills of which he was lessee.

The defendants had never assented to, or adopted, or derived any benefit from the obstruction in question; and although they had refused to incur themselves the risk or cost of removing it, they had given leave to the plaintiff to enter and remove it whenever he pleased to do so.

M'Intyre showed cause against the rule.

Mellish and *Bowen* in support of the rule.

The COURT were of opinion that there was no evidence of a wrongful continuance of the obstruction by the defendants for which they were liable in this action.

Rule discharged.

Exchequer. Jan. 18. } MAXSTED *v.* PAINE.

Sale of Shares—Usage of Stock Exchange.

This action, which came before the Court as a special case, was brought to recover 600*l.*, the amount of two calls in respect of thirty shares in Overend, Gurney & Co. (Limited).

Overend, Gurney & Co. stopped payment on May 10, 1866, and on the 24th the plaintiff instructed his brokers to sell 100 shares, and they were accordingly sold at 17 discount on that day for the next account day, the 30th, to the defendant, who was a stock jobber or dealer, and a member of the London Stock Exchange. The defendant had himself sold thirty shares in the same company on May 11 to Witten, another dealer, who, on the 29th, the 'name' day, gave the defendant the name of one Maxwell as the nominee or ultimate purchaser of the thirty shares bought from the defendant, and the defendant gave the same name to the plaintiff's brokers as the name of the ultimate purchaser of thirty of the plaintiff's shares.

It appeared that Witten had got Maxwell's name from one North under the following circumstances. At an interview between North, Maxwell, and one Punchard, at North's office, on May 12, Punchard having become the purchaser of eighty Overend & Gurney shares for May 15 from Witten, through North, Maxwell, who was a member of the Stock Exchange, expressed his opinion that no legal transfer of the shares could be made, and said he should have no objection to his name being passed as the nominee and purchaser of the shares if the dealers could make a valid transfer. It was thereupon arranged that, in consideration of Punchard taking on himself certain liabilities of Maxwell's, Maxwell should remain responsible on the Overend & Gurney shares. On May 14, North accordingly handed Maxwell's name to Witten, but did not tell him that Maxwell's acceptance or purchase were subject to the dealers being able to make a valid transfer. The shares were

then, on North's instructions, carried over to May 31, North, however, having no authority from Punchard or Maxwell to give such instructions.

On June 8, Maxwell refused to execute a transfer of the shares in respect of which this action was brought.

C. Pollock (*Herschell* with him), for the plaintiff, contended that the defendant was liable, having returned the name of a person who was legally entitled to repudiate the transfer of the shares to him.

Mellish (*Beresford* with him) contended that the defendant had fulfilled his contract. He knew nothing of Maxwell; it was for the plaintiff to object at the proper time to Maxwell as a purchaser. This he had not done; on the other hand he had now deprived himself of the power of transferring the shares to the defendant or his nominee.

The Court (Channell, B., Pigott, B., and Cleasby, B.) held, that after May 15 the undertaking of Maxwell was at an end, the carrying over to the 30th having been without his authority, and that, consequently, the defendant's contract with the plaintiff was not performed.

Judgment for the plaintiff.

Exchequer. Jan. 20. } Courtauld *v.* Legh.

Easement—Right to Light—Prescription Act, s. 3—Actual Enjoyment.

Special case stated by an arbitrator pursuant to judge's order in an action for obstruction of flow of light to the plaintiff's house.

It appeared from the case that the defendant had, in August and September 1865, erected a building on his land which obstructed the flow of light to the plaintiff's house, and the question between the parties was whether the plaintiff was entitled to such flow of light. With respect to that point the facts were as follows:—In 1829 the house, No. 15 Lewes Crescent, Kemp Town, Brighton, which was then in the course of construction, was conveyed to one Goodall. Goodall continued the building of the house, and before the end of 1830 completed the structural portions thereof, laid the floors, and put in the windows, but he did not complete the internal fittings of the said house, nor paint, paper, or decorate the same; and the said house was not, in the state in which it then was, fit for habitation. The house remained in the same state until plaintiff bought it. The plaintiff, after he bought the house and it was conveyed to him, in November 1852, completed the internal fittings, painted, papered, and decorated it, and made it completely fit for habitation. At the end of 1853 he went with his family to reside in the house, before which time it had never been occupied. They left the house at the end of 1855, since which time it has been occupied by a housekeeper of the plaintiff.

Garth (*Thesiger* with him), for the plaintiff, contended that there had been an actual enjoyment of the flow of light to the plaintiff's house for a period of twenty years, and that, therefore, a right had been obtained under section 3 of the Prescription Act.

Pollock (*Thrupp* with him), for the defendant, argued that the house having been unoccupied and unfit for habitation up to a period within twenty years, there could have been no actual enjoyment within the Act so as to confer a right to the flow of light.

The Court (Kelly, C.B., Channell, B., Pigott, B., and Cleasby, B.) held that there had been an actual enjoyment of the right to the flow of light for twenty years within the Acts, and that, therefore, the plaintiff was entitled to judgment.

Judgment for the plaintiff.

APPEAL FROM REVISING BARRISTER'S COURT.

Common Pleas. Nov. 24, Jan. 18. } Medwin (Appellant), Streeter (Respondent).

Parliament—Borough Vote—Claim to be Rated, when too late.

The respondent, who claimed to be entitled to be on the list of voters for a borough in respect of his occupation of a house, had never been rated, but had paid prior to July 20, 1868, all rates due in respect of such house up to Jan. 5, 1868. He afterwards claimed to be rated to all poor rates made since July 31, 1867, but this claim was not served on the overseers until Aug. 24, 1868; and the question, therefore, was whether that was not too late, and consequently invalid. A poor rate had been made Jan. 15, 1868, which was the only poor rate in force when the claim to be rated was made. The revising barrister thought that the claim to be rated was too late, but in deference to the decision of the Court of Common Pleas in Ireland in *Agnew* v. *Reilly* (2 Ir. Com. Law Rep 560) and *Muldowney* v. *Malcolmson* (15 Ir. Com. Law Rep. 375), under provisions in the Irish Act, 13 & 14 Vict. c. 67, ss. 55 & 110, similar to those in the English Act, 2 Wm. IV. c. 45, s. 130, that a claim to be rated served in August was sufficient and had relation to the time when the rate was made, he allowed the claim. The present appeal was argued last Michaelmas Term by

Keane (*Lumley Smith* with him) for the appellant; and

Pickering for the respondent.

Cur. adv. vult.

The Court now held that as the qualification must be completed by July 31, the claim to be rated was too late, and consequently the respondent was not entitled to be on the list of voters.

Decision reversed.

Probate and Matrimonial Causes.

Divorce and Matrimonial Causes. Jan. 19. } PATCH *v.* PATCH.

Husband's Petition—Alimony pendente lite.

Alimony *pendente lite* was allotted to the wife, the respondent in the suit, but the order was suspended to enable the petitioner to file affidavits in proof of an allegation that she was supporting herself by prostitution. No affidavits having been filed, the order was drawn up on December 15.

Littler, for the petitioner, now moved the Court to rescind the order. He relied on three affidavits—two by policemen, who deposed that the house in which the respondent lived was a noted brothel; and the third, by a confessed prostitute and a lodger in the house, to the same effect.

Inderwick appeared for the respondent, who admitted in her affidavit in reply that she kept lodgers, but denied that her house was a brothel.

The JUDGE-ORDINARY refused, under the circumstances, to act upon the petitioner's affidavits, and to rescind the order for alimony *pendente lite*. There was oath against oath, and if the respondent had sworn falsely she was liable to a prosecution for perjury.

Notes of Recent Decisions.

COMMON LAW.

NEGLIGENCE.—Defendant, a contractor, was engaged by the Metropolitan Board of Works to construct a sewer along a highway. It was necessary to cut a trench in the highway, and, after building the sewer, to fill in the trench, and to restore and make good the surface of the highway. The sewer was built and finished; the trench was filled in and completed by defendant; the work was properly done; the surface of the road was properly reinstated and made good; but, subsequently, a hole appeared in the highway, which was caused, as the jury found, by the natural subsidence of the soil. Into this plaintiff's horse fell, and plaintiff's wife was injured. Defendant did nothing to the highway after he had completed the work; but the jury found that the parish had not taken to it so as to relieve defendant from the obligation of looking after the work and making good its subsequent defects.—Held, affirming the judgment of the Court of Queen's Bench (36 Law J. Rep. (N.S.) Q. B., 166), that defendant was not liable in an action brought against him by the plaintiff, he having done all that he was bound to do to the highway.—*Hyams* v. *Webster*, 38 Law J. Rep. (Exch. Ch.) Q. B. 21.

SALE BY SAMPLE.—Where the contract is for merchantable goods, and the sale is by seller's sample, which represents to the buyer a merchantable article and discloses no defect, and the goods are accepted as according with the sample, there is still an implied warranty of their being merchantable, in respect of all such matters as cannot be judged of by the sample—just as there would be if bulk had been inspected, and defects could not thereby be ascertained.—*Mody* v. *Greg* n (Exch. Ch.), 38 Law J. Rep. Exch. 12.

MAGISTRATE'S CASES.

LARCENY.—Partridges about three weeks old and able to fly a little, whichhad been hatched and reared under a common hen, placed under a hen-coop, and after the removal of the coop had remained about the place with the hen as her brood, sleeping under her wings at night, may be the subject of larceny.—*Regina* v. *Shickle*, 38 Law J. Rep. M. C. 21.

LARCENY.—To constitute larceny, there must be a taking of the property against the will of the owner. But the cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine orders, and to judge of their genuineness. Therefore, a cashier who, deceived by a forged order, purporting to be drawn by a customer, pays money to the payee, who presents it knowing it to be forged, thereby parts with the property in the money of the bank to the payee so as to bind his employer; and the payee is therefore not guilty of larceny, but of obtaining money by false pretences. And a conviction of a person who received the money, with a knowledge of the fraud, from the payee who had obtained it in the manner above mentioned, for receiving the money knowing it to have been stolen, was held bad.—*Reg.* v. *Prince*, 38 Law J. Rep. M. C. 8.

NUISANCE.—Where a nuisance is ascertained by the nuisance authority to exist, it is not necessary before taking proceedings against the owner, under section 21 of the Sanitary Act, 1866, and section 12 of the Nuisances Removal Act, 1855, to serve him with a notice in the form given in the schedule to the latter Act, Form (C).—*Ames* v. *Creed*, 38 Law J. Rep. M. C. 22.

Martin v. Mackonochie.

THE following is a copy of the Order in Council on the appeal of *Martin* v. *Mackonochie* from the Court of Arches to the Queen in Council:—

At the Court at Osborne House, Isle of Wight, the 14th day of January, 1869.

Present.—The Queen's Most Excellent Majesty, Lord Chancellor, Lord President, Lord Chamberlain, Mr. Goschen.

Whereas there was this day read at the Board a report from the Judicial Committee of the Privy Council, dated the 23rd of December, 1868, in the words following, viz.:—

'Whereas, in a certain cause of the office of the Judge, which was lately depending in the Arches Court of Canterbury, and was promoted and brought in virtue of letters of request, under the hand and seal of the Right Rev. Father in God Archibald Campbell, by Divine permission Lord Bishop of London, by John Martin, a parishioner of the new parish of St Alban's, Holborn, in the county of Middlesex, diocese of London, and province of Canterbury, against the Rev. Alexander Heriot Mackonochie, a clerk in holy orders of the United Church of England and Ireland, the incumbent and perpetual curate of the said parish, the Right Hon. Sir Robert Joseph Phillimore, Knight, Doctor of Laws, the Judge of the said Court, did on the 28th day of March, 1868, by his interlocutory decree, pronounce that the proctor for the said John Martin had sufficiently proved his intention deduced in the 3rd, 4th, 7th, 8th, 9th, 10th, and 11th articles given in and admitted in the said cause, and that the Rev. Alexander Heriot Mackonochie, clerk, had offended against the statutes, laws, constitutions, and canons of the Church of England in the particular matters alleged and set forth in the said articles in manner as hereinafter mentioned, and did therefore monish the said Rev. Alexander Heriot Mackonochie to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, as also from the use of incense and from the mixing water with the wine during the administration of the said Holy Communion, as pleaded in the said articles, but did give no costs; and whereas an appeal from the said decree has been prosecuted to your Majesty in Council on behalf of the said John Martin, in so far only as the said Judge did not by his said decree pronounce that the said Alexander Heriot Mackonochie had offended against the statute law and the constitutions and canons ecclesiastical by having knelt or prostrated himself before the consecrated elements during the Prayer of Consecration, and by having permitted and sanctioned such kneeling or prostrating by other clerks in holy orders, and did omit or decline to admonish him against so offending in future, and did omit or decline to pronounce that the said Alexander Heriot Mackonochie had offended against the statute law and the constitutions and canons ecclesiastical by having used lighted candles on the Communion Table during the celebration of the Holy Communion at times when such lighted candles were not wanted for the purpose of giving light, and by having permitted and sanctioned such use of lighted candles, and did omit or decline to admonish him against so offending in future, and also did omit or decline to condemn the said Alexander Heriot Mackonochie in the costs incurred in the said cause on behalf of the said John Martin; and whereas the usual petition of appeal to your Majesty in Council of the proctors of the said John Martin stands referred to this Committee under and by virtue of your Majesty's General Order in Council of the 4th day of November, 1867; and whereas an appearance has been entered in the registry of your Majesty's Court of Appeals on behalf of the said Alexander Heriot Mackonochie, the respondent in the said cause of appeal. Now, the Lords of the Committee having, in obedience to your Majesty's said Order in Council, taken the said petition into consideration, and read the proceedings and evidence transmitted from the Court below, and on four former days heard counsel and proctors on both sides, and having maturely deliberated, have this day agreed humbly to report to your Majesty their opinion in favour of the appeal of the said John Martin that the decree of the Court below ought to be amended to the extent hereinafter mentioned, that the principal cause ought to be retained, and therein that in addition to the matters in which the said Alexander Heriot Mackonochie was, in the decree appealed from, pronounced to have offended, and from which he was thereby monished to abstain for the future, he, the said Alexander Heriot Mackonochie ought to be pronounced to have offended against the statutes, laws, constitutions, and canons of the Church of England by having within the said Church of the new parish of St. Alban's, Holborn, knelt or prostrated himself before the consecrated elements during the Prayer of Consecration, and also by having within the said Church used lighted candles on the Communion table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light, and that the said Alexander Heriot Mackonochie ought to be admonished to abstain for the future from kneeling or prostrating himself before the consecrated elements during the Prayer of Consecration, and also from using in the said church lighted candles on the Communion table during the celebration of the Holy Communion at times when such lighted candles are not wanted for the purpose of giving light; and further, that he, the said Alexander Heriot Mackonochie, ought to be condemned in the costs incurred on behalf of the said John Martin, as well in the Court below as in the said appeal.'

Her Majesty having taken the said report into consideration, was pleased by and with the advice of Her Privy Council to approve thereof and of what is therein recommended, and to order, as it is hereby ordered, that the same be duly and punctually observed, complied with, and carried into execution. Whereof all persons whom it may concern are to take notice and govern themselves accordingly.

ARTHUR HELPS.

Table of Cases.

EQUITY.

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LORD HATHERLEY, L.C. Jan. 25. } HAWKINS *v.* MALTBY.

Shares—Transfer—Priority—Custom of Stock Exchange—Sub-Purchaser—Indemnity.

The facts of this case will be found reported in 37 Law J. Rep. (N.S.) Chanc. 58. The bill was filed for specific performance of a contract for the purchase of shares, the plaintiff being the original vendor, and the defendant being a sub-purchaser from the jobbers, to whom the shares were originally sold.

On the former occasion Vice-Chancellor WOOD dismissed the bill with costs, on the ground that the defendant was not bound by his contract to take a transfer of shares upon which a call was overdue; but on appeal, the Lord Chancellor (CHELMSFORD) disapproved of this ground of decision, though he affirmed the decree on the ground of a variation between the contract as alleged and the contract proved; the dismissal of the appeal to be without costs and without prejudice to any new bill the plaintiff might be advised to file.

A new bill was accordingly filed, and the MASTER OF THE ROLLS made a decree (3 Notes of Cases, 219), from which the present appeal was brought.

Mr. Southgate and *Mr. Bush* argued the case on the part of the appellant.

Mr. Townsend (with whom was *Mr. Jessel*), for the respondent, was not called upon to support the decree.

The LORD CHANCELLOR dismissed the appeal with costs.

LORDS JUSTICES. Jan. 14, 15, 21. } BEAUMONT *v.* OLIVEIRA.

Will—Charitable Bequest—Royal Societies—Pure Personalty—Priority—Costs.

In this case there were two appeals from an order of Vice-Chancellor STUART made on further consideration. The facts of the case and the decision of His HONOUR are stated in the Law J. Notes of Cases, 1868, 211, and 38 Law J. Rep. Chanc. 62. From that decision the Royal Society and the Royal Geographical Society appealed, on the ground that they were not charities within the meaning of the Mortmain Act; they also appealed from His HONOUR'S order making them bear their own costs.

The plaintiffs also appealed from so much of His HONOUR'S order as declared that the testator's property in Madeira was to be dealt with as pure personalty, and therefore applicable primarily to the payment of charity legacies; and also that the charitable legacies were to be paid out of the pure personal estate in priority of testator's debts and costs of suit, as well as in priority of the other legacies.

Sir R. Palmer and *Mr. Langworthy* for the plaintiffs.

Mr. Dickinson, *Mr. Archibald Smith*, and *Mr. Bagshawe* for the appellant societies.

Mr. Greene, *Mr. Pearson*, *Mr. Wickens*, *Mr. A. Bailey*, and *Mr. Davey* for other parties.

SELWYN, L.J. delivered the judgment of the Court, and agreed with the VICE-CHANCELLOR that the Royal Society and Royal Geographical Society were charities within the meaning of the Mortmain Act. With regard to the other points, it was clear that the charitable legacies were entitled to be paid out of the pure personalty in priority of the other legacies, but there was nothing in the will to relieve the pure personalty from contributing to the debts and costs of the suit. The proceeds of the Madeira estate, although they did not come within the Statute of Mortmain, could not be treated as pure personalty in the sense in which that term was used in the testator's will. The VICE-CHANCELLOR'S order must be varied accordingly. The appellant societies must bear their own costs in the first appeal; but the costs of the second appeal, and of the other parties in the first appeal, would come out of the estate.

LORDS JUSTICES. Jan. 23. } DAWS *v.* ROWLAND.

Damage to Freehold—Boundaries—Injunction—Bill to Enforce Award.

The plaintiff and defendant were owners of adjacent estates; the eastern boundary of the plaintiff's land, as claimed by him, consisted of a raised bank planted with trees on the top, and with a quick-set hedge on its eastern side. Disputes arose some time ago respecting the plaintiff's right to the bank, and the defendant set up a post and rail fence on the western side of the line of trees as the boundary between the two estates.

In 1867 the plaintiff brought an action at law against the defendant in respect of this act, and subsequently the matter in dispute was referred, by the order of Mr. Baron BRAMWELL, to an arbitrator, to whom was given power to settle the boundaries, and direct the execution of any necessary deeds. In January 1868 the arbitrator awarded the bank to the plaintiff, and directed the defendant to give up possession thereof. This award was made a rule of Court. At the end of March the defendant, having removed the posts and rails from the western side of the line of trees, began to re-erect them on the eastern side, between the trees and the quick-set hedge, and shortly afterwards commenced to throw down the portion of the bank on the eastern side of the fence he had so erected, and to destroy and grub up the quick-set hedge. Under these circumstances, the plaintiff filed his bill on April 24, alleging that, if the defendant continued his operations, he would thereby erase and destroy the plaintiff's boundary marks, and injure the plaintiff's inheritance; and that it would be difficult, if not wholly impossible, again to ascertain the boundary of the plaintiff's lands, and praying for an injunction and damages.

His HONOUR (the Vice-Chancellor MALINS), on December 5, 1868, dismissed the bill with costs. The plaintiff appealed from His HONOUR'S decision.

Mr. Glasse and *Mr. Phear* were for the appellant.

Mr. Little and *Mr. A. G. Marten*, for the respondent, were not called on.

Their LORDSHIPS said that this was not a bill to prevent multitudinous suits nor vexatious litigation, nor did it allege such irreparable damage to the plaintiff's freehold as the Court would feel bound to prevent. It was, in fact, a bill to enforce an award at law. That award had been made a rule of Court, and the plaintiff had a sufficient remedy at law, and relief by legal process under the award. They held that no reason had been substantiated for invoking the aid of the Court; that, therefore, the VICE-CHANCELLOR'S order was correct, and the appeal must be dismissed with costs.

LORDS JUSTICES. Jan. 22. } *In re* BIDDULPH. *Ex parte* NORRIS.

Bankruptcy—Proof of Debts—Breach of Trust Committed under Mistake as to the Nature of the Trust.

By the will and seven codicils thereto, made in 1824, the Countess de Frere bequeathed a sum of money to her executors, of whom Mr. Biddulph was one, upon trust for a certain person for life, and afterwards for the executors beneficially. Until the year 1841, it was supposed that these seven codicils alone existed. In fact, however, there was an eighth codicil, which gave the fund in question to persons represented by the present claimants. In the year 1836 the sum of 3,000*l.* was advanced by a banking firm, of which Mr. Biddulph was a member, out of the balance then to the credit of the Countess's executors, upon a security not authorised by the trust, and which afterwards proved to be insufficient. In 1840 the firm became bankrupt. The co-executor of Mr. Biddulph, who had shortly before discovered the eighth codicil, proved against the joint estate for the balance then owing from the bank, but gave credit for the 3,000*l.* as being secured (see *In re Biddulph*, 6 De G. M. & G., 801, where the facts are stated in detail).

The claim now was to prove against the separate estate of Mr. Biddulph for the deficiency of the security. It did not appear whether the tenant for life authorised the investment, but no complaint had ever been made by him.

Mr. Commissioner HOLROYD decided that the case was governed by *In re Biddulph*, and refused the proof.

Mr. De Gex and *Mr. Ramadge* for the appellants.

Mr. Amphlett and *Mr. Elderton* for the assignees.

Their LORDSHIPS held that the proof should be admitted, upon the ground that there had been a breach of trust.

LORDS JUSTICES. Jan. 25. } WHITE *v.* SPRINGETT.

Will—Construction.

A testator gave, in the event of the death under 25 of two of three named grandchildren (which happened), the residue of his personal estate, after payment of 10,000*l.* to the third grandchild, to the person or persons, exclusive of his surviving grandchild, who, under the statutes for distribution of the personal estates of intestates, would, immediately after the decease of the survivor of his other two grandchildren, be entitled to his estate if he had then died intestate.

At the time of the decease of the second grandchild, the third grandchild was the testator's sole next of kin.

The MASTER OF THE ROLLS held that the persons who would at that time have been the next of kin if the third grandchild had been dead also, were entitled. The grandchild appealed on the ground that there was an intestacy.

Mr. Jessel and *Mr. Casson* for the appellant.

Mr. Southgate and *Mr. Villiers* for the respondents.

Their LORDSHIPS dismissed the appeal with costs.

LORDS JUSTICES. Jan. 26. } BLACKFORD *v.* DAVIS.

Practice — Form of Decree in Redemption Suit—Just Allowances—Consolidated Order xxiii. *r.* 16.

This was an appeal from a decree of Vice-Chancellor STUART, made in a redemption suit. The mortgage under which the appellant, the defendant, claimed provided expressly for the payment of the costs of preparing the mortgage deed and for the payment of the costs of any actions or suits which the defendant, as mortgagee in possession, might find it necessary to bring relative to the mortgaged premises.

The decree made by His HONOUR directed an account of what was due for principal and interest to the defendant, and also an account of what the defendant had received, or, but for wilful default, might have received; and it ordered that the moneys so received should be applied first in discharge of the interest, and then in sinking the principal.

The defendant complained that this decree did not provide for his being allowed the costs above mentioned.

Mr. Little and *Mr. Bardswell* for the appellant.

Mr. Mackeson and *Mr. W. W. Cooper*, for the respondent, were not called upon.

Their LORDSHIPS dismissed the appeal with costs, upon the ground that all the costs and expenses referred to by the appellant would be allowed as ordinary 'just allowances.'

LORD ROMILLY, M.R. Jan. 21. } STARR *v.* THE MAYOR AND CORPORATION OF LONDON.

The London City Improvement Act, 1847.

The plaintiff was the owner of distinct properties required by the defendants for the purposes of the Holborn Valley improvements. The object of the suit was to restrain the Lord Mayor issuing a warrant to the sheriff directing him to summon one jury to assess the properties in a lump, the plaintiff insisting that he had a right to have his properties valued separately by distinct juries.

Mr. Jessel and *Mr. Bury*, for the plaintiff, now moved to restrain the Lord Mayor from issuing such warrant.

Mr. Swanston and *Mr. A. E. Miller* for the defendants.

The MASTER OF THE ROLLS refused the motion.

LORD ROMILLY, M.R. Jan. 22. } FISHER *v.* GILPIN.

Breach of Trust—Replacement of Fund.

A breach of trust had been committed by an unauthorised investment in debentures of the London, Chatham & Dover Railway Company. The question was, whether the estate of the defaulting trustee was liable to make good what would have been produced by

an investment in Consols, or whether he had the option of replacing the sum invested with interest at 4 per cent.

Mr. Montague Cookson, for the *cestuis que trustent*, submitted that *Brown* v. *Gellatly*, 2 Law Rep. Chanc. Ap. 751, deprived trustees of the option allowed them by the earlier case of *Robinson* v. *Robinson*, 1 D. M. & G. 247.

Mr. Jolliffe represented the estate of the trustee.

The MASTER OF THE ROLLS held that the trustee still had the option as between himself and his *cestui que trust*, *Brown* v. *Gellatly* being a case between tenant for life and remainderman.

LORD ROMILLY, M.R. Jan. 24. } *In re* PHILP.

Will—Construction—Class—Persons 'then Living or their Heirs.'

The question upon this petition was as to the effect of a codicil made by the testator, Thomas Philp, by which he appointed a fund of 1,300*l.* stock, over which he had an absolute power, subject to his wife's life interest therein. By the codicil in question he gave the fund, after his wife's death, 'to my children then living, or their heirs.' The testator had seven children, two of whom were dead at the date of the will, one of them leaving a child. Three other children died after the testator in the widow's lifetime, and two survived the widow.

Sir R. Baggallay, *Mr. Bristowe*, *Mr. Hannen*, *Mr. Rawlinson*, and *Mr. Hadley*, appeared for the various claimants.

His LORDSHIP held that the effect of the codicil was to divide the fund between the surviving children and the next of kin of all those who were dead.

LORD ROMILLY, M.R. Jan. 26. } *In re* THE GENERAL BANK FOR THE PROMOTION OF AGRICULTURE AND PUBLIC WORKS (LIMITED AND REDUCED).

Company—Reduction of Capital—Notice to Creditors—General Orders of March 21, 1868.

At extraordinary general meetings of this company, resolutions had been passed for the reduction of their capital. The general orders of March 21, 1868, by section 6, direct the company thereupon to file an affidavit, verifying a list containing the names and addresses of the creditors, and, by section 9, require the company, within seven days after the filing of such affidavit, or such further time as the judge may allow, to send a notice to each creditor whose name is entered on the list.

Debentures payable to bearer had been issued by the company, and the company had also become guarantee for others of the same nature issued by the Société Cotonnière de St. Etienne du Ronoray; and since it was not known by whom these debentures were held, it was impossible to comply strictly with the directions of the general order. Under these circumstances,

Mr. Jessel (*Mr. Davey* with him) suggested that notice should be given to the debenture holders by advertisement, and that the time should be extended for the purpose.

The MASTER OF THE ROLLS assented.

LORD ROMILLY, M.R. Jan. 25, 27. } *Re* THE CHINA STEAMSHIP CO. *Ex parte* MACKENZIE.

Companies Act, 1862, s. 75—Debenture.

After a resolution for winding the above company up voluntarily, Lowes, a shareholder, assigned some debentures issued to himself, to Mackenzie for value; notice was given to the company, a call was subsequently made, and the company was afterwards ordered to be wound up compulsorily.

Proof of the debt due on the debentures had been allowed, but subject to the calls due on Lowes' shares, on the ground that section 75 of the Companies Act made the call relate back, so that debentures were only assignable subject to any calls that might be made.

This was a summons to vary the certificate by admitting proof in full.

Mr. Jessel and *Mr. F. J. Turner* for Mackenzie.

Mr. Roxburgh and *Mr. Wickens*, for the official liquidator, contended that the call related back to the time when Mackenzie became a shareholder.

Mr. Jessel replied.

27.—The MASTER OF THE ROLLS said the question depended on the construction of section 75 of the Companies Act, 1862, the object of which seemed to prevent such assignments as these. The call related back to the commencement of the winding-up. The summons must therefore be dismissed.

STUART, V.C. Jan. 20. } TURTON *v.* MEACHAM.

Mortgagor and Mortgagee—Equitable Mortgagee—Legal Mortgagee—Notice—Priorities.

The question in this case was whether a legal mortgagee of one moiety of lands was entitled to priority over the owner of the other moiety, who held an equitable mortgage by deposit of the title deeds of the first moiety, prior in date to the legal mortgage.

The facts of the case were, very shortly, these:—

The plaintiff and one James Batham were tenants in common in fee of the lands in question. They borrowed of Thomas Lea 1,000*l.* upon the security of a deposit of the title deeds of the property, accompanied by a memorandum in writing. After that, Batham, without the knowledge of the plaintiff, executed a legal mortgage of his moiety to the defendant Meacham, to secure 500*l.* Batham acted as the defendant's solicitor in the transaction; and the defendant admitted that he placed confidence in him. It was proved that the defendant Meacham, when he took his mortgage, inquired for the title deeds, and was told they were in the possession of Lea, as equitable mortgagee; although that was denied by Meacham, who asserted that he was told they were in the possession of the plaintiff, as the other tenant in common. The rights of Lea, as equitable mortgagee, had become vested in the plaintiff; and arguments turned on the question whether Meacham had notice of the equitable mortgage to Lea; it being also contended that there was an extinction or merger of Lea's prior title.

Mr. Greene and *Mr. Tremlett* for the plaintiff.

Mr. Dickinson and *Mr. W. R. Fisher* for the defendant Meacham.

Mr. A. Smith, *Mr. Woodhouse*, *Mr. W. W. Streeten*, and *Mr. Maskelyne* for other parties.

STUART, V.C. was of opinion that even if Meacham's statement were true, and he relied upon, and was deceived by, Batham's representations, the loss he suffered

by his own agent must fall upon himself; that the attempt to show extinction or merger had failed, and that upon the whole case, the plaintiff was entitled to the priority over the defendant Meacham, which he sought to establish in the suit, and His Honour made a declaration accordingly.

Stuart, V.C. Jan. 21. } Griffin *v.* Morgan.

Practice—Decree—Chancery Practice Amendment Act, s. 52—Previous Marriage of Female Plaintiff unknown to the Court, and the Parties to the Suit, at the Time of the Decree—Defect in Suit—Supplemental Bill.

This was an administration suit, in which the plaintiffs were three infants, suing by their father as their next friend. On April 22, 1867, one of the infants married a Mr. Thomas Huntley, but she was not then aware of the proceedings in this suit; and T. Huntley was not aware that his wife was a ward of Court. On November 19, 1867, the usual administration decree was made. Mrs. Huntley was the only party to the suit who was then aware of the marriage. She attained her majority on September 10, 1868.

The fact of the marriage having since become known, a motion was now made on behalf of all the plaintiffs for the usual order, under the 15 & 16 Vict. c. 86, s. 52, to revive the suit. Mr. Huntley had made an affidavit, apologising for his contempt of Court, and offering to execute any settlement, and otherwise to be bound by any decree or order of the Court, as it might think proper.

Mr. Kekewich appeared in support of the motion, and cited *Capps* v. *Capps*, 4 Law J. Rep. Chanc. Ap. 1.

Mr. Fry was for the defendant.

Stuart, V.C. said that in the case referred to there had been an actual abatement, but here the suit was merely defective, by an alteration in the status of one of the parties to it, and which was not known when the decree was made. That defect could only be cured by a supplemental bill. The Chancery Practice Amendment Act applied to ordinary cases of revivor; and as to them, there was no distinction drawn by the Act between infants and adults. No order on the motion.

Stuart, V.C. Jan. 21. } Railton *v.* Easey.

County Court—Pleading—Objection to the Jurisdiction.

This was a motion, in the nature of an appeal from a decision of the judge of the County Court sitting at Clerkenwell. The plaint in the suit was filed for the purpose of setting aside and cancelling two documents or assignments on the ground of fraud. The facts of the case were not now gone into. It was, however, stated that the County Court judge had refused to make any order on the motion when it was before him, but had sanctioned the present application.

The application was made under these circumstances: The objection taken by the defendant to the plaint was that the County Court had no jurisdiction to entertain the suit. To raise that objection before the County Court judge, it was said that a statement in the nature of a demurrer alone to the jurisdiction was not allowed by the rules of the County Court; but that such an objection must be accompanied by a statement substantially denying the facts alleged in the plaint. To have done that in the present case would have been most expensive; and, moreover, the defendant did not wish to adopt that course. Under those circumstances, the defendant made a motion in the County Court to take the plaint off the file for want of jurisdiction. The judge was of opinion that he could not entertain such a motion, but gave the defendant leave to apply, in any way he might be advised, to this Court. The defendant now renewed the motion here, and stated the facts of the case, so far as they are above set forth, and the difficulty in which the defendant was placed by the rules of the County Court.

Mr. Cecil Russell appeared in support of the motion, and added to the facts above mentioned that the County Court rules did not provide for appeals from interlocutory applications.

Mr. Woodroffe opposed the application.

Stuart, V.C. was of opinion that he could make no order now on this motion. It was substantially an appeal from a County Court; but every appeal from a County Court ought to be by a case, regularly signed, as required by the County Courts Act. With respect to the difficulty as to the mode of raising the question of jurisdiction in the County Court, he thought, as there was no such thing as a demurrer in those Courts, this was a case in which the County Court judge should be informed that this Court thought a mere statement of the fact that the defendant alleged the Court had no jurisdiction in the case, ought to be allowed, in the first instance, without any further pleading. If the judge then decided that he had jurisdiction in the case, an appeal from that decision might be brought here in the regular course. The costs of the application must be costs in the cause.

Stuart, V.C. Jan. 22. { *Re* Clitherow's Settled Estates, and *Re* the Leases and Sales of Settled Estates Act.

The Lands Clauses Consolidation Act, 1845, *s.* 69—*The Leases and Sales of Settled Estates Act, s.* 23—*Settled Estate — Tenant for Life, without Impeachment of Waste—Sale—Application of Purchase-Money—'Permanent Improvements.'*

This matter came on upon a petition, praying an order to the effect that a portion of the purchase-money of certain settled estates, which had been sold under the order of the Court, might be applied in making improvements on another estate, which had been purchased and settled upon the same trusts as subsisted with respect to the original estates.

The improvements, which it was shown were necessary, and which it was sought to make, were these:—A new road, 550*l.*; a new farm house, 500*l.*; new farm buildings, 200*l.*; repairs to old buildings and fences, 150*l.*; and the underdraining of 130 acres of the estates, 650*l.* The tenant for life of the property held it without impeachment of waste, and was not bound to bear the expense of the proposed improvements.

Mr. Freeling appeared for the petitioner, and stated that the only question was whether the Court had jurisdiction under the Leases and Sales of Settled Estates Act, s. 23, to make the order asked? Similar orders had been made under the Lands Clauses Consolidation Act, 1845, s. 69, but it did not appear that any had been made under the Leases and Sales of Settled Estates Act.

Mr. North appeared for respondents.

STUART, V.C. made the order prayed by the petition, subject to the production of an affidavit, that the proposed improvements were for the permanent benefit of the estate.

STUART, V.C. Jan. 25. } CROW *v.* PETTRISGILL.

Mortgage—Father and Son—Satisfaction of the Mortgage by the Son—Right of the Son's Widow to be repaid out of the Father's Estate, the Advance made by her Husband.

The plaintiff in this case was the widow and executrix of the son of the owner in fee simple of a farm called Bradwell Farm. Robert Crow, the father, purchased the farm in 1808, when he mortgaged it to James Stone for a term of 1,000 years, to secure 3,000*l.* and interest. Robert Crow, the father, paid off 500*l.* of the mortgage money. In 1852 the father and son made cross wills, each devising and bequeathing to the other his real and personal estate absolutely. In 1853 the son gave notice to the mortgagee that he wished to pay off the mortgage, and paid off 1,500*l.* of it. He afterwards paid off the remaining 1,000*l.* In 1862 the father made another will, by which he devised to his son a life interest only in part of the property which he had previously intended to give to him absolutely. The father died in 1865, and the son early in 1866, leaving the plaintiff his widow, and executrix and residuary legatee. The farm had been since sold under trusts for sale contained in the father's will; and the son's widow sought in this suit to have it declared that she was entitled to be paid out of the purchase money (which was considerable) of the farm, the 2,500*l.* advanced by her late husband, in satisfaction of the mortgage. The question was whether the payment by the son of his father's debts was so made as to show an intention that the 2,500*l.* advanced by the son should be kept alive as a charge on the farm for his benefit. Each side alleged an agreement in support of their case; the plaintiff insisted that it was agreed that the money should be repaid by the father or his estate; the defendant, Worship, who represented one of the father's residuary legatees, contended that the father had given up possession of the farm to the son, together with the stock upon it, on condition that he paid off the mortgage on it; that the son was in possession of the farm till his death, and at a nominal rent. But that if that were not so, the son had given his father the money. Further, that whatever might have been the son's motive for paying off the debt, the moment he had done so, he became, *quâ* the repayment, a simple contract creditor only of the father's estate. If he, instead of his widow, had sued for it, he would have been barred by the statute of limitations. The defendant lastly endeavoured to show that the son had by his conduct released his claim to be repaid the 2,500*l.* from either his father or his estate. For all those reasons it was insisted that the plaintiff could not now recover the money.

Mr. Greene and *Mr. Lorence Bird* were for the plaintiff.

Mr. Dickinson and *Mr. North* were for the defendant.

STUART, V.C. thought that neither party had proved their alleged agreement, but that on the whole case the plaintiff was entitled to the relief which she sought by her bill; and made a declaration accordingly.

JAMES, V.C. Jan. 18, 19, 22. } CHARLTON *v.* THE EARL OF DURHAM.

Executors—Trust Moneys—Receipt of One.

Under the will of Thomas Glaholm, who died in 1849, his five children became entitled to his residuary estate in equal shares. By the said will Charlton and Wilson were appointed executors, and the executors were authorised to allow any part of the testator's residuary estate to remain on the then existing securities. Part of the residuary estate was secured by the bond of certain trustees of the Earl of Durham, a minor. In September 1849 Lord Durham attained 21, and in the course of the same year, with the view of relieving his trustees from their liability on the bond, he gave Glaholm's executors a new bond from himself in exchange for the old bond. In the new bond, the obligees, Charlton and Wilson, were described as executors of Glaholm. This bond was deposited at a bank of which Wilson was a cashier, and interest was regularly paid thereon to Wilson, who gave receipts for himself and his co-executor. A moiety of the 5,000*l.* was paid off in 1859. In 1862 the remaining moiety was paid to Wilson, who gave a receipt purporting to be signed by himself and his co-executor Charlton. The bond was thereupon cancelled. Charlton's signature to the receipt was a forgery, and Wilson appropriated the whole of the money. Charlton and the children entitled under the will filed this bill to recover the 2,500*l.* so lost, seeking to make Lord Durham liable on the ground of negligence and notice, and that the receipt was not a release, being signed by only one of two trustees.

Mr. Kay and *Mr. Haddan* were for the plaintiffs, and contended that the lapse of time from the testator's death, and the renewal of the security, showed the moneys were standing on a trust account, and not merely on the account of executors.

Mr. Druce and *Mr. Chitty* for the defendant.

JAMES, V.C. said that the executors still held the money on an executorship, and not a trust account. There was no notice to the defendant of the trusts of the money. The Courts had gone to the verge of justice in helping *cestui que trustent* in this sort of case, and he thought Lord Durham had been fully discharged from his liability. The bill must be dismissed with costs.

JAMES, V.C. Jan. 26, 27. } ROBERTS *v.* MORETON.

Purchase of Insolvent's Property by Assignee—Right of Insolvent to Sue—Lapse of Time.

In April 1844 the plaintiff, under the law then in force, filed a petition in the Insolvent Debtors' Court; in July 1844 the defendant was appointed creditors' assignee, and as such, on January 7, 1845, he caused certain real estate of the plaintiff's to be exposed for sale by auction. The bill alleged that, by the contrivance of the defendant, the sale was thinly attended, and that the property was knocked down to the defendant's brother at 150*l.* less than its real value, in pursuance of an arrangement between him and the defendant. The facts as to the sale were known to the plaintiff in June 1845.

In March 1845 the plaintiff, being a trader, was adjudicated a bankrupt on his own petition, and on May 16, 1845, he obtained a certificate of conformity. All the creditors under the bankruptcy were paid in full, and a revesting order was made in the bankruptcy.

The bill prayed that the sale might be set aside, and that two deeds by which it was carried into effect might be cancelled.

Mr. Kay and *Mr. Ford North* for the plaintiff.

Mr. Swanston and *Mr. M'Naghten* for the defendant.

JAMES, V.C. said that he was satisfied that the sale was of such a character that if it had been questioned in proper time and by a proper plaintiff, it would have been set aside, and he was inclined to think that the plaintiff was entitled to sue, although he had not obtained a revesting order from the Insolvent Debtors' Court on this point. His HONOUR considered the case similar to *Troup* v. *Ricardo*, 34 Law J. Rep. (N.S.) Chanc. 91. But he was of opinion that the plaintiff's delay in instituting proceedings was not explained, and that even if the sale were set aside there would be no surplus to come to the plaintiff. For these reasons the bill must be dismissed with costs.

Courts of Common Law.

Queen's Bench.
Jan. 12.
} HENDERSON *v.* SQUIRE.

Landlord and Tenant—Implied Contract—Giving up Possession at Determination of Tenancy—Under-Tenant Holding Over—Ejectment—Damages—Pleading—Payment into Court—Amendment.

The first count of the declaration was for breaking and entering a house of the plaintiff's, and keeping the plaintiff out of it, and preventing him from letting it. The second count alleged that the defendant was tenant to the plaintiff upon the terms that he should, at the determination of the tenancy, give up possession to the plaintiff; that the tenancy was determined, yet that the defendant did not give up possession.

Plea to the first count, Not Guilty; to the second, Payment into Court of 40*s*.

The defendant was tenant to the plaintiff of a house, part of which he had underlet to James Turner. The tenancy of the defendant was determined at Christmas 1866, and he had given Turner notice to quit on Dec. 21. Notwithstanding this notice, Turner would not go out, so that the defendant was unable to give up the absolute possession of the house to the plaintiff. On May 4 following the plaintiff brought an action of ejectment against the defendant and Turner. Possession was given him by the sheriff on May 28. This present action was brought to recover the costs of the ejectment and half a year's rent.

At the trial a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff for the costs of the ejectment, and half a year's rent, less the 40*s*. paid into Court.

Field and *Cave* now showed cause against a rule which had been obtained.

Hawkins and *Raymond* supported the rule. They contended that the defendant, by pleading payment into Court in answer to the second count, had admitted the breach alleged, and that upon that ground, as well as upon the law generally, the rule must be made absolute.

Per curiam (COCKBURN, C.J., BLACKBURN, J., MELLOR, J., and HAYES, J.).—We think that the defendant ought not to be bound by the payment into Court, so as to prevent his being allowed to deny that he was liable for the half year's rent. If necessary, we should allow an amendment to be made, but we think that he was bound to give up the absolute possession of the house to the plaintiff upon the determination of the tenancy, and therefore that the plaintiff is entitled, in this action, to recover the half-year's rent, and also the costs of the ejectment.

Rule absolute.

Queen's Bench.
Nov. 10, Jan. 20.
} BAILY *v.* DE CRESPIGNY.

Covenantor and Covenantee—Repeal of Covenant by Operation of Law—Compulsory Assignment of Land to Railway Company.

Declaration. That the defendant by deed devised to the plaintiff a house and land at Camberwell, and for a term of years, and covenanted that neither the defendant, nor his heirs nor assigns, should or would, during the term, permit to be built on the ground or paddock fronting the premises towards the north, any house, &c., except summer-houses, &c. Averment of conditions precedent. Breach. That during the term defendant permitted a railway station to be built on the ground or paddock before mentioned. The declaration also stated, that after making the deed and during the term, defendant assigned the ground and paddock to the London, Brighton & South Coast Railway Co.; and that the company, after the assignment and during the term, and while they were possessed of the ground and paddock by virtue of the assignment from the defendant, built the railway station on the ground and paddock contrary to defendant's covenant.

Plea. That, before the committing of the alleged breaches, and after the making of the deed, the London, Brighton & South Coast Railway Co. required to take and purchase the ground or paddock under the powers given them by their special Act, and that the ground or paddock was land which the company were empowered by the Act to purchase and take compulsorily for the purposes of their undertaking; and after the making of the deed, and before the committing of the breaches, the company compulsorily purchased and took the ground or paddock, and for the completion of the purchase the defendant did, by deed, convey the ground or paddock to the company and their successors, which is the assignment in the declaration mentioned, and that the company being thereby seised in fee of the ground or paddock, built the station, &c., which were erections reasonably required by them for the purposes of their undertaking

Replication. That though reasonable, it was neither necessary or compulsory for the company to build the station on the land in question.

Demurrer by plaintiff to the plea of the defendant to the replication, and joinder in demurrer.

F. M. White, for the plaintiff, argued that the defendant was not discharged from his liability under the covenant by the Act of Parliament; and secondly, that as the company had only a liberty to build but no obligation to do so, it could not be said that the Act of Parliament had rendered the performance of the covenant impossible.

Raymond, for the defendant, contended that in covenanting for himself and his assigns, the lessor only contemplated his own voluntary assigns, over whom he had control, and not such assigns as the Legislature had thrust upon him.

The COURT (COCKBURN, C.J., LUSH, J., HANNEN, J., and HAYES, J.), after taking time to consider, now (January 20) delivered judgment. It must be taken on the pleadings that the assignment was made altogether under the Act of Parliament. The company had therefore become assignees of the defendant by the act of the Legislature and by operation of law, and he was exonerated from the performance of his covenant on the principle *lex non cogit ad impossibilia*.

Judgment for the defendant.

Queen's Bench. Jan. 23. } REGINA *v.* FRANCIS RUSSELL.

Office of Clerk of the Peace—Misdemeanour—1 W. & M. c. 21, s. 6—Jurisdiction of Court of Quarter Sessions—Judgment, how far conclusive.

This was a proceeding by *quo warranto*, and the facts were stated in a special verdict. It appeared that the relator, Mr. H. Wildes, had held the office of clerk of the peace for the county of Kent for several years before May 23, 1865. A claim which he made to certain fees was disputed, and an attorney was engaged by certain of the justices, acting on behalf of the sessions, to resist his claim. The matter was compromised, and a bill of costs being due to the attorney for services in respect of the claim, the finance committee of justices recommended it to be paid out of the county rate, in a report made to a Court of quarter sessions; and that Court, adopting the recommendation, ordered it to be paid. It was the duty of the clerk of the peace to enter this order on the proceedings of the Court, and for the county treasurer afterwards to pay the bill so ordered to be paid. In practice, however, the treasurer paid before the order was formally entered and recorded by the clerk of the peace, and he did so on this occasion. Although full particulars of the bill of costs had been given to the finance committee, only a short note of the bill had been presented to the sessions by the committee, in which the amount was stated to be due to the attorney for professional services rendered and money paid on account of the general business of the county. The relator refused to record the order for the payment of this bill, and in a letter which he wrote to Lord Romney, the chairman of the Quarter Sessions, he stated that his reason for not entering the order was that the bill had not been presented in the usual manner by the finance committee, but only a short note of it, and that he would therefore report to the Court on the subject. At the next meeting of the Court he stated as reasons for not entering the order, that no bill of costs with the items had been presented, and that the costs were not such as ought to be borne by the county, but only by the justices who had personally engaged the attorney. Being called on by the chairman to say whether he still refused to enter the order, he replied that he did, and the matter was referred to the finance committee to take such measures as they should think right on the subject. Charges in writing were thereupon exhibited against the relator under 1 W. & M. c. 21, stating the circumstances and that he 'wilfully wrongfully, maliciously, and contumaciously, and without reasonable or lawful excuse,' refused to enter and record the order, and so had misdemeaned himself in the execution of his office. The charges came before the Court of Quarter Sessions May 23, 1865, when, after hearing evidence and counsel both for and against the relator, the Court adjudged that the charges were proved, and dismissed him from his office of clerk. The questions now raised were, first, whether it was competent for the Court of Queen's Bench to interfere with the decision of the Quarter Sessions, after that Court had entertained the charge and heard the relator by counsel. Secondly, assuming that the Court of Queen's Bench could interfere with the decision, whether there was sufficient evidence that the relator had misdemeaned himself in his office so as to justify his dismissal.

Montague Chambers (*Gates* with him) for the relator, and

Mellish (*Archibald* with him) for the defendant.

The COURT (COCKBURN, C.J., HANNEN, J., and HAYES, J.) gave judgment for the defendant. It was not competent for the Court of Queen's Bench to inquire into the correctness of the decision of the Court of Quarter Sessions. The Quarter Sessions was a competent tribunal, and had evidence before it which was relevant to the matter in question. Being a Court of Record, its judgment ought at least to have the effect of a magistrate's conviction on a matter properly commenced before him. Apart from this point, the COURT expressed itself satisfied with the decision on the merits.

Judgment for the defendant.

Queen's Bench. Jan. 25. } SIMPSON *v.* MARAVITA.

Irish Bankruptcy Act (20 & 21 *Vict. c.* 60)—*Action brought in England—Effect of Certificate—Protection.*

This action was, on October 2 last, brought against the defendant by the plaintiff, both carrying on business in London. On December 10 a verdict was obtained by the plaintiff for 34*l.* 15*s.* 10*d.* A *ca. sa.* was issued on January 8, on which day the costs were taxed, and the defendant was arrested on the 13th. He produced to the officers a protection granted to him, by the Court of Bankruptcy in Ireland, on January 12, and which was to extend until February 12. He had been adjudicated a bankrupt in Ireland on November 20. On January 12, the defendant obtained a first-class certificate, but it was retained in Court, one month being allowed for any creditor to appear against its being granted.

An application was made to BLACKBURN, J., at Chambers for an order for his discharge, and the learned judge made an order that he should be discharged unless within four days a rule *nisi* was obtained calling upon the defendant to show cause why that order should not be rescinded. A rule was obtained, against which

Garth and *Joseph Sharpe* showed cause.

Shaw, in support of the rule, contended that the

defendant was not entitled to be discharged from arrest. He was arrested for the debt and costs; and at any rate neither the certificate nor the protection could be any answer to the plaintiff's right to recover the costs. *Maugham* v. *Vinesberg*, 37 Law J. Rep. C. P. 210, s. c.; Law J. Rep. 3 C. P. 318, is an authority to show that the defendant cannot be entitled to be discharged, so far as those costs are concerned.

Per curiam (COCKBURN, C.J., MELLOR, J., and HAYES, J.).—There are many cases which show that the certificate will operate as a bar to the right to arrest the defendant in respect either of the debt or the costs. *Maugham* v. *Vinesberg* is no doubt opposed to those cases, but we cannot agree with it; and as it was apparently decided without much consideration and without a full argument, we do not consider that we ought to be bound by it. The arrest of the defendant was unlawful, and he must be discharged.

Rule discharged without costs.

Queen's Bench. Jan. 25. } WREN *v.* WIELD.

Patent—Slander of Title—Particulars of Infringement.

The declaration contained a number of counts setting out letters of the defendant, written to persons to whom the plaintiff had sold certain 'spooling machines patented by him,' stating that if they used the machines they must take the consequences, as they were an infringement of the defendant's patent.

The defendant pleaded *not guilty*.

Webster moved for a rule calling upon the defendant to show cause why he should not deliver particulars, showing by reference to page and line what part or parts of the Specifications of the Patents of 1858 and 1860, set out in the declaration, the defendant alleged to be infringed. He contended that the defendant by the course he had adopted, of writing letters slandering the title of the plaintiff, had compelled the plaintiff to bring this action, and that the plaintiff ought to be furnished with particulars, in the same way as he would be if the defendant had proceeded against him in the usual way for the infringement of his patent. Without such particulars the plaintiff could not prepare for trial.

The Court granted a rule *nisi*.

Aston showed cause in the first instance, but the Court intimated so strong an opinion that the particulars should be given, that he consented that it should be done, but asked that the defendant should be allowed to begin and give evidence in support of his patent at the trial in the same way as is provided by 15 & 16 Vict. c. 83, s. 41.

Per curiam (COCKBURN, C.J., MELLOR, J., and HAYES, J.).—If the defendant had chosen to proceed by *scire facias* he would have been entitled to that privilege; but we do not think that, under the present circumstances, he ought to be so.

Rule absolute to deliver particulars.

Queen's Bench. Jan. 25. } SADLER *v.* SMITH.

Arbitration and Award—Boat Race—Decision of Referee when final.

This was an action for money had and received against the defendant, who was stakeholder in a race between the plaintiff and one Kelley. It appeared that the plaintiff and Kelley had entered into the following agreement:—'Articles of agreement between Henry Kelley, of Putney, on the one part, and Joseph Sadler, of Putney, on the other part. They hereby agree to row a right-away sculler's race from Putney to the Ship at Mortlake, the start to take place between the aqueduct and the steamboat pier on Wednesday, November 27, for the sum of 300*l.* a side, the start to take place at half-past 2 P.M. The steamboats accompanying the race to be behind the men at starting, the cutter also accompanying the men to keep astern of the sternmost man. To row according to the recognised rules of boat racing. The referee to be chosen at the last deposit, and whose decision shall be final, 50*l.* aside being now staked in the hands of the editor of the *Sportsman* (the defendant), &c. Either party failing to comply with these conditions to forfeit all money down.' At the trial of the case it appeared that at the time appointed for the race the referee was on board a steamer. Sadler and Kelley came to their station. After about five minutes had been spent in fruitless attempts at starting, Kelley rowed from his station to the steamboat, and complained that Sadler would not start fairly. The referee looked for Sadler, and, not seeing him, told Kelley to go to his station and tell Sadler that, if he would not start, he must start without him, and if he still refused, to row over the course. Kelley then rowed off, but the referee did not hear him repeat the order to Sadler. Kelley then rowed over the course (Sadler remaining behind), and the referee decided that he was entitled to the stakes. The jury, in answer to questions from the Lord Chief Justice, found that the order of the referee was not properly communicated to Sadler, and a verdict was entered for the plaintiff, with leave to move to enter it for the defendant, on the ground that the decision of the referee was final. A rule having been obtained accordingly,

Henry James and *Brickwood* showed cause, and

Garth and *Tennant* supported the rule.

The COURT (COCKBURN, C.J., HANNEN, J., and HAYES, J.) discharged the rule. Assuming that the referee had power to make an order as to how the start should be made, his jurisdiction to award the stakes could only arise after a start had actually taken place. But there never was any such start as was required, so that the foundation of the authority of the referee failed, and his award had no effect.

Rule discharged.

Common Pleas. Jan. 20, 21. } *Re* HULL ELECTION PETITION. PEASE AND OTHERS (PETITIONERS), NORWOOD AND CLAY (RESPONDENTS).

Parliamentary Elections Act, 1868—31 & 32 *Vict.* c. 125, *ss.* 6, 8, 9, 22—*Security for Costs—Joint Respondents to same Petition.*

Sir J. Karslake, for the petitioners, showed cause against a rule to rescind an order of WILLES, J., and that all proceedings in the petition be stayed, on the ground that the recognisance filed was not a recognisance within the Parliamentary Elections Act, 1868, and that no recognisance had been given, or money deposited, within the meaning of that Act.

Mellish and *Henry James*, argued in support of the rule.

The petition was a joint petition against the return of the two respondents as members for the borough of Hull. The recognisance which had been filed was shown by affidavit to have been entered into by four of

the petitioners, who were altogether twelve in number. On hearing a summons to set aside such recognisance as void, WILLES, J. refused to make an order in the terms of the summons; but His LORDSHIP made the order which it was now sought to rescind, and by that order he declared the security to be insufficient, but ordered that if 1,000*l.* were deposited within three days, the petition should be deemed at issue. A sum of 1,000*l.* was accordingly deposited, and the questions before the Court on this rule were—1. Whether, as by section 22 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), which allows two or more members, including candidates, to be made respondents to the same petition, it is enacted, 'but for all the purposes of the Act such petition shall be deemed to be a separate petition against each respondent,' there may be only one security for costs to the amount of 1,000*l.* if there are several joint respondents to one petition, or whether there must not be as many securities to that amount as there are respondents. 2. Whether an objection to the recognisance, on the ground of its having been entered into by some of the petitioners, was a good one; and if so, whether it was fatal as if no security at all had been given, or whether it was an objection only to the sufficiency of the security, and therefore capable of being removed by a deposit of money.

Manisty, Sir P. Colquhoun, O'Brien (*Serjeant*), *Price, O'Malley, Huddleston, Jelf, Nasmyth, Herschell, Cave, Gates, Jeune,* and *Beaumont* (some of whom appeared in support of, and others against, similar orders of WILLES, J., made in other petition cases, in which the same questions were raised as those above-mentioned) were heard shortly on these points.

The COURT (BOVILL, C.J., BYLES, J., KEATING, J., and MONTAGUE SMITH, J.), being of opinion that the security for costs required by the Act is collateral only to the petition, and no part of the proceedings thereon, held that the provision in section 22, as to the petition being deemed separate as against each respondent, does not apply to the security for costs, and that, consequently, in this case one security for 1,000*l.* was sufficient, although there were several respondents. Held also by BOVILL, C.J. and BYLES, J. (KEATING, J. and MONTAGUE SMITH, J. *dubitante*), that if the objection to the recognisance in this case was a good one, yet it was to be treated as one to the sufficiency only of the security, and came, therefore, within sections 8 and 9, and was removed by the deposit which had been afterwards made of 1,000*l.*

Rule discharged.

Common Pleas. Jan. 23. } VILLISBASNET *v.* TOBIN AND OTHERS.

Interrogatories—Common Law Procedure Act, 1854, *s.* 51—*Where the Answers will criminate the Party—Affidavit disclosing special Grounds for such Interrogatories.*

Day applied on behalf of the plaintiff for a rule to vary an order of MARTIN, B., allowing certain interrogatories to be put to the defendants, but disallowing others. The action was for a false representation by the defendants as directors of a joint-stock company, by which the plaintiff had been induced to take shares. The object of the interrogatories, which had been disallowed, was to connect the defendants with a prospectus, and to show that the statement in such prospectus as to the number of shares which had been issued and paid up was false. It was said that the answer of the defendants might subject them to an indictment for a conspiracy to defraud, and that therefore, unless there were special circumstances, the Court ought not in its discretion to allow them.

Quain showed cause in the first instance.

The COURT (KEATING, J. and MONTAGUE SMITH, J.), acting upon the decision in *Edmunds* v. *Greenwood* (3 Law J. Notes of Cases, 259), and in the exercise of their discretion, considered that in the absence of an affidavit sufficiently showing special circumstances to necessitate the putting of such interrogatories, they ought not to interfere with the order made by MARTIN, B. at Chambers.

Rule discharged.

Common Pleas. Jan. 23. } BURROUGHES *v.* SMYTH.

*Landlord and Tenant—Distress—*2 *W. & M. ses.* 1, *c.* 5, *s.* 2—*Leaving Surplus for Owner's Use—Damages.*

The defendant had distrained for rent on premises which he had let to one Scott. The goods realised 90*l.*, and after paying the rent and expenses of distress, there was a balance of about 5*l.*, which was handed over by the broker to Scott, the tenant. It appeared that the most valuable part of the goods distrained on was a billiard table, the property of the plaintiff, which had been let by him to Scott, and which, with its fittings, was valued at 65*l.* The Act 2 W. & M. ses. 1, c. 5, s. 2, requires the overplus (if any) to be left in the hands of the sheriff or constable for the owner's use. As this had not been done, the present action was brought, and the plaintiff obtained a verdict for 5*l.* A rule *nisi* was obtained to set this aside, on the ground that there was no evidence the plaintiff had sustained special damage, as all the goods sold were not his, and therefore the 5*l.* did not belong to him; and next, that if it had been left with the constable, it would probably have been given by him to the tenant, and the result would have been the same as it had been.

Channell showed cause.

Henry James in support of the rule.

The COURT (KEATING, J. and MONTAGUE SMITH, J.) held, that, as the billiard table was the plaintiff's, and formed the most valuable part of the goods distrained, and there would have been no surplus without it, the 5*l.* belonged to the plaintiff; and that, as it could not be supposed that the constable would not have done his duty if the money had been left with him, there was sufficient evidence of special damage to maintain the action.

Rule discharged.

Exchequer. Jan. 22. } DICKSON *v.* THE NEATH AND BRECON RAILWAY COMPANY.

Common Law Procedure Act, 1854, *s.* 60—*Examination of Judgment Debtor—Corporation.*

In this case, judgment having been obtained against the defendant, an application had been made at Judges' Chambers for an order for the oral examination of some of the directors and the secretary of the company, under section 60 of the Common Law Procedure Act, 1854. That section enacts that 'it shall be lawful for any creditor who has obtained judgment, to apply to the Court or a judge for a rule or order that the judgment debtor

be orally examined,' &c. The application having been referred from Chambers to this Court, and

J. O. Griffits having obtained a rule *nisi*,

Gates, for the directors, showed cause, contending that the Court had no power to treat the directors individually as judgment debtors.

Bridge appeared for the secretary.

J. O. Griffits, in support of the rule, contended that, although no special provision was to be found in section 60 (as in sections 50 and 51) to meet the case of a corporation, the statute should receive a liberal construction from the Court, so that there should be no exception to the general rule.

KELLY, C.B., PIGOTT B., and CLEASBY, B. (CHANNELL, B. *hæsitante*) held that they had no power to make the order.

Rule discharged.

Exchequer. Jan. 26. } ALEXANDER AND OTHERS *v.* SIZER.

Principal and Agent—Promissory Note.

In this case the question (which was raised on a rule to enter the verdict for the defendant) was, whether the defendant had made himself personally liable by making a promissory note in the following form:—

1,500*l.* On demand I promise to pay Messrs. Alexander & Co., or order, the sum of fifteen hundred pounds, with legal interest thereon until paid. Value received the 16th day of August, 1865.

For the Mistley, Thorpe & Walton Railway Co.
J. SIZER, Secretary

Witness,
C. Taylor.

The only material facts proved at the trial were, that the note was given in respect of a loan advanced for the benefit of the Mistley, Thorpe & Walton Railway Company, and that the company had no borrowing powers.

Henry Matthews and *Joyce* argued, for the plaintiffs, that the note contained no words binding on the company, and that the defendant was, therefore, personally liable, as the note would otherwise be of no effect whatever.

Philbrick, contra, contended that, on the face of the instrument, it was clear that the defendant was not intended to be personally liable, and that in making the note he had merely performed a ministerial act for the company.

The COURT (KELLY, C.B., PIGOTT, B., and CLEASBY, B.) held that the defendant was not personally liable on the note, and made the

Rule absolute accordingly.

Exchequer. Jan. 22, 26. } PEARCE *v.* COKER.

Mesne Profits—Judgment by default in Ejectment—Evidence of Defendant's Possession.

At the trial of this action for mesne profits before CHANNELL, B., it was proved that a writ in ejectment had been issued against the defendant on February 5, 1868, and that he suffered judgment by default on the 29th of the same month; also that by a lease of the premises (which was not produced), the defendant had covenanted to pay a rent of 327*l.* a year. A verdict having been entered for the plaintiff for 327*l.*, together with 26*l.*, the costs of the action of ejectment, a rule was obtained for a nonsuit, or to reduce the damages, on the ground that there was no proof of the defendant's possession of the premises.

The *Solicitor-General* and *Pinder* showed cause, contending that the judgment by default in ejectment must be presumed to have been obtained after proper service, &c., and was therefore sufficient evidence of the defendant's possession to entitle the plaintiff to keep his verdict.

H. T. Cole, for the defendant, argued that the judgment by default in ejectment was not *per se* proof of the defendant's possession, since it might have been obtained without service on the defendant, and the other evidence given at the trial was not sufficient to prove it; and that the plaintiff was not entitled to recover the costs of the ejectment.

KELLY, C.B., CHANNELL, B., PIGOTT, B., and CLEASBY, B., held, that although the judgment by default in ejectment was not evidence of the defendant's possession, the other evidence given at the trial entitled the plaintiff to damages equal to the amount of rent for twenty-four days (the interval between the writ and the judgment in February 1868), together with the costs of the ejectment.

Rule absolute to reduce the damages accordingly.

APPEALS FROM REVISING BARRISTERS' COURTS.

Common Pleas. Jan. 25. } TROTTER *v.* WATSON.

County Vote—Lessee or Assignee of Term of Sixty Years—Building Society—30 & 31 Vict. c. 102, s. 5.

This was an appeal from the decision of one of the Revising Barristers.

By an agreement made between (1) the owners of a freehold estate, (2) the trustees of a building society, and (3) one Clayton, Clayton was to advance 7,000*l.* to be expended in building houses on the estate, the occupants of such houses were to pay to the trustees certain sums by instalments, the trustees were to repay Clayton out of such moneys, and when Clayton (who was not obliged to do so till entirely repaid) requested, with the consent of the trustees, the owners of the estate were to grant the occupants leases for ninety-nine years. The claimant was an occupant of one of the houses, and by an agreement between him and the trustees on his payment of certain instalments, and fulfilment of the rules of the society, and the performance of the conditions of the two agreements, he was to have a lease for ninety-nine years. The claimant had only paid part of the money he had to pay, Clayton had only been paid in part, and no claim by Clayton or the trustees for the granting of a term to the claimant had been made. The claimant claimed to be entitled to have a county vote under 30 & 31 Vict. c. 102, s. 5, as being lessee for the unexpired residue of a term originally created for not less than sixty years, and the revising barrister allowed the claim.

Manisty (*Lovesy* with him) for the appellant.
Joshua Williams for the respondent.

The COURT held that even if an equitable term would do, no such term existed, but at most an equitable right to have a term on the fulfilment of certain conditions not yet fulfilled.

Decision reversed.

Common Pleas. Jan. 22. } FRYER (APPELLANT), BODENHAM (RESPONDENT).

Parliament—Borough Vote—Occupation as Owner—Eleemosynary Institution.

The appellant claimed to be entitled to vote for a member for the borough of Hereford, and the question was, whether his occupation of a house belonging to an institution called Lord Coningsby's Hospital, was such an occupation by him as owner as would confer a vote for this borough. It appeared that in the institution, which is not a corporation, there are twelve persons called servitors, each of whom is appointed to a house, which he holds for life, and from the occupation of which he cannot be disturbed, except in the case of his being guilty of murder or other felony. Clothes, coal, and board, &c., are found him out of the charity. There are rules for the governance of the hospital which he is obliged to obey, or to be subject to the payment of a fine. The claimant had paid the poor rates to which the house he occupied had been rated, but a part of this had been returned to him out of the funds of the charity. The Revising Barrister, being of opinion that the occupation was of an eleemosynary character, disallowed the claim.

Dowdeswell (*George Brown* with him) for the appellant.

Macnamara for the respondent.

The COURT held that the claimant occupied the house as owner within the meaning of the Representation of the People Act, 1867, s. 3, and that the case came within the principle of *Roberts* v. *Percival*, 34 Law J. Rep. C. P. 84, and was distinguishable from that of *Heartley* v. *Banks*, 28 Law J. Rep. C. P. 144.

Decision reversed.

Court of Criminal Appeal.

Coram BOVILL, C.J., BYLES, J., CHANNELL, B., PIGOTT, B., LUSH, J.

Crown Case Reserved. Jan. 23. } REGINA *v.* FIRTH.

Larceny—Gas—Continuous Taking—Election.

Case stated by the chairman of the West Riding Quarter Sessions.

The prisoner was employed in the firm of Samuel and John Firth, worsted manufacturers, of Lily Lane Mill, Halifax, and took an active part in the management of the business. The mill was supplied with gas from the Halifax Gas Works. About the year 1861 a former engine tenter and another, by the orders of either a deceased partner in the firm, or the prisoner, were put to repair a pipe which was pointed out to them, and was buried in the earth, and formed a junction with the main pipe from the gas works. The prisoner was present and saw them do it. And, again, about two years ago, the prisoner ordered the same man to take up this pipe in order to get the water out. This pipe ran from the north-east corner of the mill to the main, and its effect was to abstract at the point of junction the gas from the main, and conduct it to several rooms in the mill, without its ever passing through the meter. There was no cock or other obstruction at the point of junction with the main, so that there was a continuous flow of gas at that point, but the gas was turned off by a cock or tap at each burner in the mill. The gas in the mill was shut off at six o'clock at night, when all the hands left.

The prisoner was indicted for stealing one thousand cubic feet of gas on April 30, 1866. At the close of the case it was objected for the prisoner that the prosecution had given evidence of a number of separate and distinct takings, extending over a period of years, and must elect one, or not more than three within six months of each other, of the particular takings on which to proceed.

Maule and *Hannay* for the prosecution.

Manisty and *Forbes* for the defence.

The COURT held, that upon this evidence the prosecution were not put to their election, for that there were not a series of separate and distinct takings, but the facts spoken to constituted one continuous taking, and one only; and, further, that the evidence need not under any circumstances have been confined to any particular number of takings, because evidence of any number might be necessary to show the nature of the act to be felonious.

Conviction affirmed.

Crown Case Reserved. Jan. 23. } REGINA *v.* TYREE.

Embezzlement—Clerk or Servant—Treasurer of Friendly Society.

Case reserved by the learned assistant judge at the Middlesex Sessions.

The prisoner held the office of treasurer to the Weymouth Lodge of Friends of Labour Loan Society, which society was enrolled, and the rules of which were certified by the Barrister appointed to certify the rules of Savings' Banks. His duties were to receive money and give receipts. He was to be responsible for money paid to him. He gave a bond for the due execution of his office. The moneys of the society were vested in trustees. He received no salary or payment as treasurer, nor were there any fixed times for accounting. He was indicted as clerk or servant to the trustees.

Metcalfe for the prosecution.

Ribton for the defence.

The COURT held that he was not a clerk or servant within 24 & 25 Vict. c. 96, s. 68, relating to embezzlement, but an independent officer of the society.

Conviction quashed.

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Courts of Equity.

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Jan. 25.

Will—Construction—Forfeiture on Marriage—Acceleration of Remainder.

This was an appeal from a decision of the Master of the Rolls, reported 36 Law J. Rep. (N.S.) Chanc. 905, 2 Notes of Cases, 206.

General Dyson having a power of appointment over some real estate, and being seised of other estates in fee, appointed and devised the same to the use of his wife and her assigns for life, with remainder to the use of his eldest son, A. F. H. Dyson, for life, with remainder to the first and other sons of A. F. H. Dyson in tail, with remainder over; and declared his will and mind to be, that in case his said wife should sell, release, or charge her said life estate of and in the said real estate, or should make or do any matter or thing whereby or by means whereof she should be deprived of the rents and profits of the same, so that her receipt alone should not be a good and sufficient discharge for the same, then and in such case it was his will, and he did thereby declare that her life estate and interest in the said hereditaments should cease and determine as fully and effectually as it would by her actual decease.

The testator died in 1861, and his widow married again without making any settlement.

Mr. Key and *Mr. McNaghten* were for the appellant, and

Sir Richard Baggallay, Mr. Cookson, and *Mr. Wingfield* for the respondent.

The Master of the Rolls held that the life estate of the widow, both in the appointed and other devised estates, was forfeited by her second marriage without a settlement; and upon appeal

The Lord Chancellor affirmed the decision, without hearing counsel for the respondent.

Lord Hatherley, L.C. } Horsley *v.* Cox.
Jan. 23, 25, 28.

Suit to Enforce Judgment.

The plaintiff appealed from the order of the Master of the Rolls (2 Notes of Cases, 328), dismissing his bill with costs.

The suit was instituted by a judgment-creditor for the purpose of enforcing the judgment against the arrears of income due to the principal defendant from the trustees of a will, under which they were directed to carry on a newspaper, and pay one-fourth of the profits to the defendant Cox, with a clause of forfeiture on alienation. As this clause would cause a forfeiture if the judgment were enforced against the interest of the defendant in the newspaper, it was only sought to get at the arrears of income already due.

Mr. Jessel and *Mr. Locock Webb* for the appellant.

Mr. Southgate, Mr. Roxburgh, and *Mr. Edmund James* for the defendant Cox.

Mr. Baggallay and *Mr. Faber* for the trustees.

The Lord Chancellor dismissed the appeal with costs.

Lord Hatherley, L.C. } Green *v.* Wynn.
Jan. 30.

Principal and Surety—Composition Deed by Principal—Right of Creditor to Prove against Surety.

This was an appeal from an order of V.C. Giffard, dismissing the plaintiff's bill with costs. The case is reported 38 Law J. Rep. (N.S.) Chanc. 76, and Notes of Cases, 1868, p. 255.

Mr. Druce and *Mr. Caldecott* for the appellant.

Mr. Kay and *Mr. Whately,* for the respondent, were not called upon.

The Lord Chancellor entirely agreed with the judgment of V.C. Giffard, and dismissed the appeal with costs.

Lord Hatherley, L.C. } Pardo *v.* Bingham.
Jan. 29, Feb. 1.

Administration—Limitations to Actions and Suits—Mercantile Law Amendment Act, 1856, 18 & 19 *Vict. c.* 97, *s.* 10.

This was an appeal by a Dr. Dupré from an order of the Master of the Rolls made on further consideration in the above suit.

The suit was a creditor's suit for the administration of the estate of Augustus Hamilton.

Mr. Hamilton was a domiciled Englishman, but lived in Venezuela for many years continuously before his death, which occurred there in 1855.

In 1862 this bill was filed, and the usual administration decree was made; and the chief clerk by his certificate dated July 1868, found that certain sums of money in respect of debts incurred by the testator with Dr. Dupré in Venezuela, between 1846 and 1855, were still unpaid, but reserved the question for the Court, whether they were or were not barred by section 10 of 19 & 20 Vict. c. 97.

The Master of the Rolls disallowed the claims: from this decision Dr. Dupré appealed.

Mr. T. Cutler for Dr. Dupré.

Mr. Hemming and *Mr. E. Cutler* for other parties.

His Lordship said that this point had been decided by the Court of Queen's Bench, in the case of *Cornill* v. *Hudson,* 8 Ell. & B. 429; s. c. 27 Law J. Rep. Q.B. 8; and although it had been argued that the authority of that decision was shaken by the judgment of the Exchequer Chamber in *Jackson* v. *Woolley,* 8 Ell. & B. 778; s. c. 27 Law J. Rep. Q.B. 448 (which was a decision on section 14 of the same Act), he agreed with the decision of the Queen's Bench. He should therefore hold that section 10 of the Mercantile Law Amendment Act was retrospective, and consequently that the claims in question were barred. The appeal must be dismissed.

Lords Justices. } Lockett *v.* Lockett.
Jan. 22, 23.

Practice—Exceptions—Sufficiency of Answer—Partnership—Account.

This was an appeal from an order of Vice-Chancellor

Malins (reported Notes of Cases, 1868, 234), whereby His Honour overruled two exceptions, which the plaintiff had taken to the defendant's answer in the suit. The plaintiff appealed from His Honour's order.

Mr. Glasse and *Mr. Everitt* for the appellant.

Sir R. Palmer, Mr. Little, and *Mr. North* for the respondent.

Their Lordships agreed with the Vice-Chancellor's order, and dismissed the appeal with costs.

Lords Justices. Jan. 27. } Beioley *v.* Carter.

Leases and Sales of Settled Estates Act, ss. 17, 18—*Unascertained Remainderman—Validity of Order of Court.*

In this case, a report of which is to be found in 3 Notes of Cases, 274, and 38 Law J. Rep. (N.S.) Chanc. 92, the bill was filed for specific performance of a contract for the purchase of an estate sold under the Leases and Sales of Settled Estates Act. The estate was, by a marriage settlement, vested in a trustee for the separate use of Mrs. Heighton, for her life, without power of anticipation; with remainder, if she should die before her husband, as she should by will appoint; and if she should survive him, as she should by deed or will appoint; and in default of appointment, to the person who should be her heir-at-law in fee. Mr. and Mrs. Heighton being both still alive, an order was made by the Court upon petition under the Leases and Sales of Settled Estates Act, for the sale of the property, and it was sold to the plaintiff, from whom the defendant afterwards contracted to purchase it. The defendant took an objection to the title, on the ground that the Court had no jurisdiction to make the order for sale, inasmuch as there was no provision in the Act for binding the interest of the person who might be the appointee or heir-at-law of Mrs. Heighton.

The Master of the Rolls held the objection to be good, and the plaintiff appealed.

Mr. Joshua Williams and *Mr. Upton* appeared for the appellant; and

Mr. Southgate and *Mr. Bristowe* for the respondent.

Their Lordships were of opinion, reversing the decision of the Master of the Rolls, that the person whose consent was required by the Act must be a person in existence and capable of being ascertained, which could not be said of the heir of a living person. All the persons in existence who had any interest in the property had concurred in the application, and the Court had full jurisdiction to make the order. There would therefore be a decree for specific performance.

Lords Justices. Jan. 28. } *Re* The Asiatic Banking Corporation. *Ex parte* The Royal Bank of India.

Winding-up—Contributory—Corporation holding Shares—Ultra Vires.

The official liquidator of the Royal Bank of India, which was in process of winding-up, appealed from an order of Vice-Chancellor Stuart, refusing an application to remove the Royal Bank of India from the list of contributories of the Asiatic Banking Corporation, also now being wound up (3 Notes of Cases, 282).

It appeared that 605 shares in the Banking Corporation were deposited by a customer with the Royal Bank, as a security for advances made to him. It was provided, by the articles of association of the Royal Bank, that shares in public companies, deposited by way of security, should not be transferred to the bank so as to involve it in the liabilities of such companies, but that the certificates should be deposited with the manager of the bank, and the debtor should sign a power of attorney authorising him, in case of non-payment of the loan at a fixed date, to sell the shares; and it was the practice of the bank to require the depositors of shares to execute transfers in blank. In consequence, however, of a decision in one of the Indian Courts, to the effect that if shares deposited by way of security remained in the name of the depositor, they must, in the event of his bankruptcy, be taken to be still in his order and disposition, the Royal Bank caused the shares so deposited to be transferred to, and registered in the name of, the Royal Bank. The transfers were not as required by the articles of association, made by deed and sealed with the common seal of the bank, but the bank received dividends on the shares, and they were standing in the name of the bank when the order was made to wind up the corporation.

The official liquidator of the corporation placed the Royal Bank on the list of contributories, and Vice-Chancellor Stuart held that it was properly so placed.

The official liquidator of the Royal Bank appealed from this decision, and

Mr. E. K. Karslake and *Mr. Fry* argued the case on behalf of the appellant.

Mr. Dickinson and *Mr. Kekewich* supported the order of the Court below.

Their Lordships held that the Royal Bank, in taking transfers of the shares, had acted within the scope of their authority, and the informality in the transfer was immaterial. They therefore dismissed the appeal with costs.

Lords Justices. Jan. 14, 21, 30. } *In re* The General Estates Co. (Limited). *Ex parte* Hastie.

Contributory—Bankruptcy Act, 1861, *s.* 154—*Companies Act,* 1862, *ss.* 75, 77—*Liability of Discharged Bankrupt.*

This was an appeal by Mr. Hastie from an order of the Master of the Rolls, dismissing without costs a summons which Mr. Hastie had taken out to have his name removed from the list of contributories to the above company, and to place the name of his assignee in bankruptcy thereon instead.

Mr. Hastie was adjudicated bankrupt in 1861; he was then the holder of 125 shares in the above company. His assignee refused to take them. The rest of his estate was duly administered; he obtained his discharge in July 1866. Shortly afterwards the company was ordered to be wound up under the supervision of the Court. Mr. Hastie's name was placed on the list of contributories for the 125 shares.

The facts of the case and judgment of the Master of the Rolls are fully reported 38 Law J. Rep. (N.S.) Chanc. 43.

Mr. Jessel and *Mr. Fischer* for Mr. Hastie.

Mr. Roxburgh and *Mr. Edmund James* for the company.

Mr. Fischer in reply.

Giffard, L.J., delivered the judgment of the Court, and dismissed the appeal with costs.

Lord Romilly, M.R. Jan. 28. *In re* The County Life Assurance Company.

Production of Documents—Solicitor's Lien—Partner.

This was a motion to compel the production of certain documents by a Mr. Mayhew, who refused on the ground of a lien for an unpaid bill of costs.

When the company was first established, a Mr. Edmands was appointed its solicitor. Shortly afterwards he entered into partnership with Mr. Mayhew, who was introduced by him to the board of directors, and the firm continued to act as solicitors for the company. In February 1866 a resolution was passed for the voluntary winding-up of the company, and the firm then acted for the liquidators. In July 1868 the partnership was dissolved, but both partners continued for a short time to act as joint solicitors for the liquidators in certain proceedings at law.

Mr. Jessel and *Mr. Ince* for the company.

Mr. Roxburgh and *Mr. Caldecott* for Mr. Mayhew.

The Master of the Rolls held, that under these circumstances Mr. Mayhew never was the solicitor of the company, and therefore could have no lien; and although the liquidators might have employed him separately in the proceedings at law, that did not make him the solicitor of the company. His Lordship therefore ordered the documents to be produced.

Stuart, V.C. Jan. 29. Williams *v.* The Carmarthen and Cardigan Railway Company.

Practice—Rectification of Decree—Consolidated Order 23, *Rule* 21—*Petition.*

Petition for an order to rectify a decree.

The suit was an ordinary suit for the specific performance by a railway company of a contract to take lands. A receiver of the company's tolls had been appointed in another suit of *Fountaine* v. *The Company.*

The Court, at the hearing of the present suit, decreed specific performance, declared the plaintiff entitled to the usual vendor's lien, and ordered the defendants to pay the purchase money and costs within one month, and that in default the plaintiff should be at liberty to apply to the receiver in *Fountaine* v. *The Company.*

The purchase money and costs were not paid as ordered, and the decree having been passed and entered but not enrolled, the plaintiff now presented a petition that the decree might be rectified by inserting therein liberty to apply to the Court to enforce his lien by sale or otherwise as he might be advised, or by inserting therein general liberty to apply, and that an order might be made for the sale of the lands under the direction of the Court.

Mr. Speed for the petitioner. This is the correction of an accidental omission in the decree, which may be done upon petition under Consolidated Order 23, Rule 21.

Mr. Phear for the respondents. This was no clerical error within the order, but an election by the plaintiff to apply to the receiver.

Stuart, V.C., after stating that the omission in the decree was through a mistake or error on the part of the petitioner, and that he must pay the costs of the petition, made the following order:—It appearing that so much of the decree as ordered that the plaintiff should be at liberty to apply for payment to the receiver in the suit of *Fountaine* v. *The Carmarthen and Cardigan Railway Company*, was inserted by mistake, order that so much thereof be struck out, and that the decree be rectified by inserting therein that the plaintiff be at liberty to make such application as he may be advised, for enforcing his lien in case of the non-payment of the purchase money, and that all parties be at liberty to apply, and that the petitioner do pay the railway company the costs of this application, to be set off against the debts and costs due from the company.

Malins, V.C. Jan. 23. *Re* South Essex Estuary and Reclamation Company.

Practice—Solicitors' Lien—Production of Documents—Companies Act, 1862, *s.* 115.

This was a summons by the official liquidator in the winding-up of the above company, that the firm of solicitors who had acted for the company, might be ordered to bring with them, and produce on their examination, certain documents relating to the company, including the parliamentary subscription contract and other papers, required by the official liquidator for the purpose of settling the list of contributories.

The solicitors objected to produce the documents on the ground that they had a lien on them for costs.

Mr. Cotton and *Mr. Sturges*, for the official liquidator, contended that the solicitors could have no lien on the papers as against the official liquidator, who was not their client but an officer of the Court; and, further, section 115 of the Act expressly provided that the production should not prejudice any lien that they might have.

Mr. Fischer, for the solicitors, contra.

The Vice-Chancellor said that the Act would be rendered abortive if the production of these papers could not be enforced; and considering them necessary for the winding-up, and that actual delivery of them was not asked, and the production of them would not prejudice the solicitors' lien, His Honour ordered the solicitors to produce them.

Malins, V.C. Jan. 28. *Re* Aberaman Iron Works. *Ex parte* Peek.

Winding-up—Contributory—Allotment of Shares—Repudiation of Contract.

This was a summons by the official liquidator in the winding-up of the above company, to have the name of Alfred Peek, a registered shareholder, placed upon the list of contributories. The liability was resisted on the ground of repudiation of the shares before completion of the contract. On August 24, 1864, Peek applied for '100 shares, or any less number,' in the usual printed form (annexed to the prospectus of the company), and paid a deposit of 1*l.* per share, undertaking to pay the further sum of 4*l.* per share on allotment. The company replied on September 5: 'We have allotted you 80 shares;' and requested payment of the further sum of 360*l.* 'on or before the 15th instant.' Peek did not pay the money, but on September 10 wrote and declined to take the shares, on the ground of some alleged misrepresentation and variance between the original prospectus and a circular which had since been issued by the company. No further action was taken in the matter by Peek. His name, however, was entered on the register for the eighty shares, and so stood at the date of the winding-up.

Mr. Cotton and *Mr. Ferrers* appeared for the summons.

Mr. Glasse and *Mr. Fischer* for Peek.

Malins, V.C. held that the contract was complete upon Peek's receipt of the notice of allotment, and that the mere enlargement by the company of the time for payment up to September 15 did not introduce a new term, so as to leave the contract open. His name was, therefore, properly put on the register; and having taken no subsequent steps to clear himself of the liability before the winding-up, he must now be placed on the list of contributories.

Malins, V.C. Jan. 30. } Leach *v.* Westall.

Partition—Sale—31 *&* 32 *Vict. c.* 40—*Unequal Shares—Costs.*

This was a partition suit, in which the property was held in unequal shares, the plaintiff being entitled to one-fifth of the estate, one of the defendants to two-fifths, and two other defendants, who were infants, to one-fifth each.

The only question was as to how the costs should be borne, whether in proportion to the different interests of the parties, or generally by the fund.

Mr. Rendall for the plaintiff.

Mr. Blackmore for the defendants.

The Vice-Chancellor directed a sale, and ordered the costs of all parties, including the costs, charges, and expenses of sale, to be paid out of the estate generally.

Malins, V.C. Jan. 30. } Wright *v.* Larmuth.

Practice—Jurisdiction—25 *&* 26 *Vict. c.* 42—*Duty of Court to decide Legal Questions—Solicitor and Client—Costs.*

This was an adjourned summons to vary the finding of the chief clerk, who had disallowed a claim made by a Mr. Jarvis, a banker and solicitor at Lynn, against the estate of one George Wright, which was being administered in the above suit. The claim was for a sum of 3,571*l.* 12*s.* 8*d.*, representing the costs of a most protracted and unsuccessful course of litigation, conducted, according to the contention of Mr. Jarvis, on behalf and for the benefit of George Wright.

The facts were briefly these. In 1853 an aged lady at Lynn, having no relatives of her own, made a will in favour of Mr. Jarvis, who acted as her banker and solicitor, and prepared the will himself; but the following year, she quarrelled with him, and found a new legal adviser in the person of a Mr. Wilkin, cancelled her will in favour of Jarvis, and made a fresh one giving all to Wilkin. Upon her death in 1856, and the discovery that he had been supplanted, Jarvis sought out the heir, George Wright, a man in a humble station in life, and in 1857 the litigation commenced with a bill filed in the name of Wright for an issue to try the validity of the will in favour of Wilkin. That bill was dismissed with costs, and also an appeal. A concurrent suit was started in the name of another plaintiff, which had no better success. Ejectment at law was then resorted to, which ended in a verdict in favour of Wilkin, and a second action ended in the same way, various points of law which were reserved being also decided in his favour, and confirmed upon appeal. Thereupon they came back to equity with a fresh suit to set aside the will, which also failed, but which was succeeded by another; pending which proceedings, in 1863, Wright died.

The foundation of the present claim was a document signed by Wright, purporting to be a retainer of Jarvis's London attorney and solicitor to act in the matter on Wright's behalf, but the document concluded with a proviso saving the right of Jarvis to set up the will in his own favour in the event of Wright's successfully impeaching the will in favour of Wilkin.

The case is worthy of note upon the question whether the validity of the claim was necessarily determinable by the Vice-Chancellor, or whether it could or ought to be submitted to a jury.

Mr. Glasse, Serjeant Tindal Atkinson, and *Mr. A. E. Miller,* for Mr. Jarvis.

Mr. J. Pearson, and *Mr. Bristowe* for the executors of Wright.

Mr. Osborne, Mr. Woodhouse, Mr. Besley (Common Law Bar), and *Mr. Dixon,* for the beneficiaries under his will.

The Vice-Chancellor said he was bound by the authority of *Re Hooper,* 32 Law J. Rep. (N.S.) Chanc. 55, to go fully into the whole matter, and decide the question of debt or no debt himself, at the same time having regard to the equitable circumstances of the case, which might possibly disentitle the claimant to succeed in equity, even though he might have obtained a verdict at law. Looking then at both the legal and equitable side of the question, His Honour decided upon the evidence that the litigation from beginning to end was Jarvis's, carried on with his money and for his exclusive benefit, and he therefore disallowed the whole claim, with costs, except those of the beneficiaries, who, His Honour considered, ought to have left the executors to fight the question for them.

Malins, V.C. Jan. 30. } Hayward *v.* Smith.

Partition—Sale—31 *&* 32 *Vict. c.* 40—*Unequal Shares—Costs.*

This was a partition suit, instituted to obtain a sale of a certain farm devised by a testator to two trustees, upon trust as to one-third for one of the testator's daughters, now dead, for life, and, subject thereto, for the plaintiff, F. Smith, absolutely; as to another one-third, for the testator's son, W. J. Smith, for life, and, subject thereto, for the plaintiff, F. Smith, absolutely; and as to the remaining one-third, for the testator's daughter, Anne Young, for life, and her husband for life, and, after the decease of the survivor of them, upon trust to sell, and hold the proceeds for her children.

Anne Young and her husband were still living, and had four children, infants.

The plaintiff, F. Smith, had mortgaged his two-thirds, subject to the interest of W. J. Smith, to the plaintiff Hayward and the two other plaintiffs, and it had become necessary to effect a sale to pay off the mortgage.

Mr. J. A. Roberts for the plaintiffs.

Mr. Boys for the defendants.

The Vice-Chancellor ordered a sale, and directed the sale to be made by the trustees by public auction, in such manner as they should think fit; and, following the previous case of *Leach* v. *Westall,* directed the costs of the suit and sale, and the charges and expenses of the trustees and the mortgagees to be paid out of the purchase-money generally.

Malins, V.C. Feb. 1. } *Re* Potter, an Infant.

Practice—Jurisdiction—Infant Settlement Act (18 & 19 *Vict. c.* 43)—*Post-nuptial Settlement—Consent of Infant.*

This was a petition presented under the above Act on behalf of a young lady of seventeen, by her uncle and next friend, for the purpose of having a settlement of her property made under the authority of the Court.

The lady had clandestinely married in June 1868 a boy of nineteen, named Richard Potter, who was dependent for his subsistence on his daily labour, and whose mother was in the receipt of parish relief.

She was entitled under a will, in the event of her attaining twenty-one, to real and personal property of the value of about 2,000*l.*, the life interest in which was settled upon her for her separate use, without power of anticipation; but this petition was presented in order to get a valid settlement made, if possible, of the reversion.

The lady, however, made an affidavit stating that the petition was presented without her consent, and that she was not desirous of executing any settlement whatever; but adding that both she and her husband were willing to execute a settlement, provided it contained a power to her, on attaining twenty-one, to advance a sum of 800*l.* for the purpose of establishing her husband in business. This offer was not accepted, the petitioner insisting that the consent of the lady was unnecessary, and that notwithstanding the marriage, and the fact that she was not a ward of Court, the Court had jurisdiction under the Act to make a valid settlement for her.

Mr. Mackeson and *Mr. Warner* for the petition.

Mr. W. Pearson, for the lady and her husband, contended that the Act did not apply to post-nuptial settlements, nor in fact to any case where the lady withheld her consent.

Mr. Sterling for the trustees of the will.

The Vice-Chancellor held that he had no jurisdiction, and dismissed the petition with costs.

Malins, V.C. Feb. 1. } Turner *v.* Nicholson.

Practice—Evidence—Notary Public—Affidavit.

This was an application for leave to file an affidavit, sworn before a notary public, in the State of Ohio, in America, without proof of the notary filling that character.

The lady on whose behalf the application was made had executed a power of attorney for the purpose of getting out of Court a fund which was standing to her separate account, and the affidavit was required to prove the execution of the power of attorney.

Mr. Jason Smith referred to *Re Earl's Trust* (4 Kay. and J. 300) and *Smith* v. *Davies* (17 W. R. 69), and submitted that as there was no opposition the affidavit was sufficient.

The Vice-Chancellor allowed it to be filed.

James, V.C. Jan. 23. } Farhall *v.* Farhall.

Administration—Securities in Banker's Hands—Advances to Executor—Notice.

Administration suit. The testator in the cause died indebted to the London and County Bank to the amount of 750*l.*, which was secured by mortgage by deposit of title deeds of part of the testator's estates. By his will the testator empowered his executors to change his real estate for payment of his debts. His widow, who alone proved the will, continued after her husband's death to draw cheques on the bank, and as a security for the sums thus paid to her, and for future advances, she deposited the title deeds of another part of her late husband's estate. She expended the sums drawn out on the maintenance of herself and children and in carrying on the testator's farm. The bank now claimed to hold the title deeds as a security for the sums so paid to the testator's widow and executrix.

Mr. Kay and *Mr. Waller* for the bank. The cheques were all drawn on the executorship account.

Mr. Druce, *Mr. Haddan*, *Mr. Higgins* and *Mr. Cottrell*, for various persons interested in the testator's estate, opposed the claim of the bank.

James, V.C., said, there was no distinction between the security for a banking account and that for money borrowed from the bank. It made no difference whether the money had been drawn out in one or in many sums, provided the bank had no notice of a breach of trust. The claim must be allowed.

James, V.C. Jan. 28. } Glaister *v.* Glaister.

Will—Construction—'Estates in County of C'—Gas and Railway Shares.

A testator made the following gift:—'I give, devise, and bequeath to my son, R. F. Glaister, all my estates in the county of Cumberland, whether in possession, reversion, remainder, or expectancy, or over which I may have any disposing power at the time of my decease, unto and to the use of my said son, his heirs, executors, and administrators, according to the respective tenures thereof.'

The testator, at the date of the gift and at the time of his death, was possessed of certain shares in the Wigton Gas Light and Coke Company, and in the Maryport and Carlisle Railway Company. The object of the former was the lighting of Wigton in Cumberland, and the gasmeters and apparatus were wholly in that county, and were vested in the shareholders in proportion to their shares. The railway was also entirely within the same county. The testator had no leaseholds in Cumberland. The question was whether these shares passed under the above gift.

Mr. Joshua Williams and *Mr. Hubert Lewis* for the plaintiff.

Mr. Druce and *Mr. Shebbeare* for the defendant.

James, V.C. held that the gift applied exclusively to real estate, and did not include the shares.

James, V.C. Jan. 30. } Utrera and Moron Railway Company (Limited).

Company—Winding-up—Appointment of Official Liquidator.

Adjourned summons for the purpose of having an official liquidator appointed in the winding-up of the above-mentioned company. The applicants, the British and Foreign Railway Plant Company, had, as creditors, obtained the winding-up order on November 25, 1868. They now proposed a Mr. Ouhardson as the officia liquidator.

Mr. Kay and *Mr. A. G. Marten*, in support of the

summons, said the nomination of the official liquidator was with the persons having the carriage of the winding-up order.

[James, V.C., said he could not assent to that proposition.]

Mr. Druce and *Mr. Rawlinson*, for creditors to a large amount, in opposition to the application, urged the appointment of Mr. Dick, their nominee. Neither side objected, in the event of the appointment of their nominees being refused, to the appointment of a Mr. Chatteris.

James, V.C., said, with regard to the appointment of an official liquidator, the Court was bound to listen to all persons having an interest in the matter. He should deal in the same way with the applicants and the respondents, and refuse to appoint their respective nominees, but instead appoint Mr. Chatteris, who was independent of both parties.

Courts of Common Law.

Exchequer Chamber. (*Error from Q.B.*) Feb. 2 and 3. } Morton and Others *v.* Woods and Others.

Mortgagor and Mortgagee—Attornment by Mortgagor in Possession—Deed not executed by Mortgagee—Term of Years—Power of Distress—Estoppel.

B., in consideration of advances from his bankers, the defendants, conveyed to them two pieces of land, the deed reciting that one portion was already mortgaged in fee upon trusts for the sale of the land, and application of the purchase money. By the deed B. 'attorned and became tenant' to the defendants, their heirs and assigns, at and from the date of the deed, of such of the premises thereby conveyed, 'as was and were in his occupation for and during the term of ten years, at and under the yearly rent of 800*l.*, provided that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators, or assigns, to enter upon the premises and to eject B., and any person or tenant claiming under him, therefrom, and to determine the term of ten years, notwithstanding any lease or leases that might have been granted by B. No rent was paid by B., nor was the deed executed by the defendants, but B. continued his exclusive occupation of the premises until the defendants distrained upon him for arrears of rent. B., having become bankrupt, his assigns brought an action against the defendants to recover damages for the seizure of the goods under the distress. The Court of Queen's Bench gave judgment for the defendants.

The plaintiffs appealed.

Joshua Williams (*Manisty* with him) for the plaintiffs.

Kemplay (*Mellish* with him) for the defendants.

Per Curiam (Kelly, C.B., Channell, B., Byles, J., Keating, J., and Cleasby, B.)—The judgment of the Court below is right, and must be affirmed. We think that B., having remained in possession, and having attorned to the defendants at the rent of 800*l.*, was estopped from denying that they had no right to distrain upon him. We think also that B. was a tenant at will, as the effect of the deed was not to create a term, but a tenancy at will. *Judgment affirmed.*

Queen's Bench. Nov. 17, Jan. 29. } Phillips *v.* Eyre.

Trespass—Act of Indemnity by Colonial Legislature—Right of Action in Superior Courts of Westminster—Conflict of Laws.

This was an action for assault and false imprisonment committed by the defendant on the plaintiff, in the island of Jamaica. There was a plea setting forth an Act of Indemnity passed by the Legislature of Jamaica, and assented to by the Crown, after the acts complained of had been done. This Act recited that a rebellion had broken out in the island, that the governor, with the advice of a council of war, had proclaimed martial law throughout the county of Surrey, with the exception only of the city and parish of Kingston, and that the military and naval forces, with others, had arrested the spread of the rebellion, and that the military, naval, and civil authorities necessarily employed might be responsible for acts done in good faith for the purpose of restoring public peace and quelling the rebellion, and that it was expedient that all persons who in good faith had acted for the crushing of the rebellious outbreak should be indemnified and kept harmless for their acts of loyalty.' The statute then proceeded to enact, first, that all proceedings, civil or criminal, present or future, against such authorities or officers, civil, military, or naval, or other persons, for anything commanded or done since the publication of martial law, that is, from October 13, 1865, and during its continuance, whether within any district in which martial law was proclaimed, or without, in furtherance of martial law, in order to suppress the insurrection and rebellion, and for the preservation of public peace throughout the island, should be discharged and made void; and that every person by whom any such act, matter, or thing should have been advised, ordered, directed, or done for the purposes aforesaid during the existence of such martial law, should be indemnified both against the Crown and against all other persons. By the second provision of the Act, His Excellency C. J. Eyre, Esq. Captain-General and Governor-in-Chief (the defendant), and all officers and other persons who had acted under his authority, or had acted *bona fide* for the purposes and during the time aforesaid,

whether such acts were done in any district in which martial law was proclaimed, or was not proclaimed, were thereby indemnified in respect of all acts, matters, and things done in order to put an end to the said rebellion; and all such acts so done were thereby made and declared to be lawful, and were confirmed. And it was further enacted that, in order to prevent any doubt which might arise whether any acts alleged to have been done under the authority of the governor, or to have been done *bona fide*, in order to suppress and put an end to the rebellion, were so done, it should be lawful for the governor for the time being to declare such acts to have been done under such authority or *bona fide* for the purposes aforesaid, and such declaration by any writing under the hand of the governor for the time being should in all cases be conclusive evidence that such acts were so done respectively.

The plea, after stating that the Act had received the royal assent and become part of the law of Jamaica, stated that the alleged grievances were committed in Jamaica after October 13, 1865, and during the continuance of the rebellion, &c., and were included in the indemnity given by the Act. To this plea there was a demurrer. There was also a new assignment and a replication that the grievances were committed beyond the territories within which the Jamaica Legislature had jurisdiction; secondly, that at the time of the Act the defendant was governor of the island, that his assent to the Act was necessary, that it had been given, and that by virtue of it the Act had become law. To this replication the defendant demurred.

Quain (*H. Payne* with him), for the plaintiff, argued that an Act of a colonial legislature has no extra territorial operation, and could not in the present case affect the cause of action in England, which vested as soon as the grievances were committed. He also argued that the governor of a colony could not join in passing an Act of Indemnity for his own protection.

Mellish (*Poland* with him), for the defendant, contended that the effect of the Act of Indemnity was not to affect the right of action in England, but to prevent the grievances complained of from becoming a cause of action anywhere.

The COURT (COCKBURN, C.J., LUSH, J., and HAYES, J.), after taking time to consider, now (January 29), delivered judgment. If the Legislature of Jamaica, instead of legislating *ex post facto*, had, in anticipation of future events, passed a statute authorising the acts complained of, no right of action would arise here, as where by the law of another country an act is lawful there, though wrongful by our law, it cannot be made the ground of an action in an English Court. The same principle which is applicable to an Act made lawful by prior legislation is equally applicable to an Act originally wrongful, but legalised by *ex post facto* law. There was no ground whatever to support the replication.

Judgment for the defendant.

Queen's Bench. Jan. 28. } GRAY *v.* WEST.

Costs—Slander—Recovery of Sum not exceeding 10*l.*—30 & 31 *Vict. c.* 142, *s.* 5.

This was an action of slander, which was commenced in October 1867, and was tried at the sittings after Trinity Term, 1868. The verdict was for the plaintiff for 10*l.* The learned judge (HANNEN, J.) refused to certify that there was sufficient reason for bringing the action in a superior Court, and a summons having been taken out at Chambers, the matter was referred to the Court.

A rule *nisi* was accordingly obtained, calling upon the defendant to show cause why the plaintiff should not be allowed his costs.

Cause was shown against the rule in Michaelmas Term by *Francis*.

The rule was supported by *Anderson*.

Cur. adv. vult.

HAYES, J. now delivered the judgment of the COURT (COCKBURN, C.J., HANNEN, J., and HAYES, J.):—There is reason to doubt whether section 5 of 30 & 31 Vict. c. 142—which provides that if in any action commenced in a superior Court in tort, the plaintiff recovers a sum not exceeding 10*l.*, he shall not be entitled to any costs of suit, unless the judge certify that there was sufficient reason for bringing such action in such superior Court, or the Court or a judge allow such costs—applies to cases in which the County Court has no jurisdiction. The plaintiff could not bring his action in the County Court, and it is impossible to suppose that the Court should not have power to allow the costs, as the legislature has shown that it intended that plaintiffs who might have sued in the County Courts, but had, on reasonable grounds, elected to proceed in the superior Courts, should be allowed to obtain an order for their costs.

Rule absolute.

Queen's Bench. (*Magistrate's Case.*) Jan. 29. } REGINA *v.* MASTER AND OTHERS, JUSTICES OF GLOUCESTERSHIRE.

*Overseer of the Poor—Bankruptcy—Auditor—Money certified to be Due—Non-Payment—Mode of Recovery—Discharge—Committal—*7 *&* 8 *Vict. c.* 101, *s.* 32.

Rule calling upon the justices of Gloucestershire to show cause why they should not cause William James to be committed to the common gaol or house of correction.

It appeared that the poor-law auditor had certified that the sum of 82*l.* 6*s.* 7*d.* was due from William James, an overseer of the poor, and that William James had not paid that sum within seven days to the treasurer of the guardians, as required by section 32 of 7 & 8 Vict. c. 101. Proceedings were taken by the auditor under section 99 of 4 & 5 Wm. IV. c. 76, to recover the money; upon the hearing of the complaint James set up as a defence that he had become bankrupt, and had received his discharge. The justices declined to issue a distress warrant, but subsequently this Court made a rule absolute, no cause being shown, directing them to do so. A return was made to the warrant, that James had no goods or chattels which could be distrained; and an application was then made to the justices to commit him to prison under the said section 99. They, however, refused to do so without the direction of this Court, thinking that the bankruptcy was an answer. The present rule was then obtained.

Grantham showed cause.

Jelf supported the rule.

Per curiam (COCKBURN, C.J., MELLOR, J., and HAYES, J.)—The rule must be discharged. The committal is given by section 99 of 4 & 5 Wm. IV. c. 76 as a punishment, not as a means of recovering a debt due. There is nothing whatever to show that by retaining this money in his hands beyond the seven days William James has committed an 'offence;' and further, the jurisdiction of

the justices can only attach where there is a debt due. In the present case the bankruptcy has extinguished the debt.

Rule discharged with costs.

Queen's Bench. Feb. 1. } REGINA *v.* OLDHAM.

Quo Warranto—Town Councillor—Dissenting Minister—Disqualification—5 & 6 Wm. IV. c. 76, s. 28.

Rule calling upon the defendant to show cause why an information in the nature of a *quo warranto* should not be filed against him, to show by what right he claimed to hold the office of a town councillor of the borough of Wallingford.

It appeared from the affidavits that the defendant had resided at Wallingford, and that he had been invited to supply the pulpit at a chapel of Pædobaptists at Pangbourne, a town about seven miles from Wallingford; he did so supply the pulpit, going over to Pangbourne on Sunday to preach at the chapel. At the time he was so supplying the pulpit, the election of town councillors for Wallingford took place. After the election was over, the congregation were about to elect him as their minister, but having examined the trust deed of the chapel, they discovered that the appointment could only be held by a Pædobaptist, which the defendant was not. He was, therefore, never appointed as the permanent minister. The rule was granted, on the ground that the defendant was disqualified under section 28 of 5 & 6 Wm. IV. c. 76, which provides that 'no person being in holy orders, or being the regular minister of any Dissenting congregation, shall be qualified to be elected, or to be a councillor,' &c.

Thesiger showed cause against the rule.

Francis supported it.

Per curiam (BLACKBURN, J., MELLOR, J., and HAYES, J.)—We do not think that the defendant can be said to be the 'regular minister' of this congregation. He seems to have been acting as the minister temporarily, but was not regularly appointed so as to be at all in an analogous position to a beneficed clergyman.

Rule discharged without costs.

Common Pleas. Jan. 26. } SCOTT *v.* COUSINS. SAME *v.* INGLIS.

Broker—Penalty for acting as Broker in London without Admittance—Acting as Broker—Clerk—57 Geo. III. c. 60, s. 2.

These were actions by the Chamberlain for the City of London to recover the penalties imposed by 57 Geo. III. c. 60, s. 2, on any person who 'shall take upon him to act as a broker,' within the said city, if he has not been admitted pursuant to 6 Ann, c. 16, s. 14.

It appeared that the defendant Cousins was the bookkeeper, and the defendant Inglis the secretary of a company incorporated under the Joint Stock Companies Act, 1862, and called 'The Open Stock Exchange Company (Limited),' which ordinarily carried on their business through a manager; but that, in his absence, it was the duty of Cousins to act for him. The transactions in respect of which the penalties were sought to be recovered arose out of the purchase and sale of some Great Eastern stock for a Mr. Ainstie. On the occasion of the purchase the bought note, which was headed with the name of the Company, was signed by Cousins 'for the manager,' and on the occasion of the sale the note was signed by Inglis as 'secretary.' On the former occasion, the only intermediate person who acted between Mr. Ainstie and the stock-jobber was the defendant Cousins; and on the latter occasion, the only intermediate person was the defendant Inglis. At the trial, before BOVILL, C.J., the case did not go to the jury, but a verdict was entered for the plaintiff in each action for 100*l.*, with leave to the defendants to move to set it aside, the Court being at liberty to draw inferences of fact. A rule *nisi* was obtained in each action to enter a verdict for the defendant, on the ground that the defendant did not take upon himself to act as broker within the statute, and further, that he acted merely as a servant or clerk, and was therefore not liable to the penalty.

Archibald showed cause.

Montagu Chambers and *Mansel Jones* in support of the rule.

The COURT were of opinion that as there was no evidence that the manager or anyone connected with the company was a duly admitted broker, the defendant in each action had acted as a broker within the meaning of the statute without deriving authority to do so from anyone authorised to give it, and consequently was liable to the penalty.

Rules discharged.

Exchequer. Jan. 23. } JOHNSON *v.* OSSENTON.

Bankruptcy Act, 1861, Schedule D.—Escrow—Assignment of Debtor's Property.

This was an interpleader issue directed to try the property in certain goods which had been seized by the sheriff under a writ of *fi. fa.*

The plaintiff claimed the goods as assignee and trustee under a deed made by one Prior in the form given in Schedule D. to the Bankruptcy Act, 1861. The defendant claimed the goods as an execution creditor of Prior. The action was tried before MARTIN, B., who directed a verdict for the plaintiff, giving the defendant leave to move to set it aside. The defendant having obtained a rule,

Tindal Atkinson, Serj., and *Eyre Lloyd* contended, for the plaintiff, that the deed was a good deed at common law, on the authority of *Symons* v. *George*, 34 Law J. Rep. (Ex. Ch.) Ex. 187; and, secondly, that the deed was good under section 192 of the Bankruptcy Act.

Garth and *C. H. Anderson*, for the defendant, argued that the deed was only intended to operate under section 192 of the Bankruptcy Act, and not otherwise, because it expressly stated that it was intended to be registered under section 192 so soon as the statutory majority of the creditors had in writing assented to it; and that, as certain of the assents relied upon and necessary to constitute the required majority were *not unqualified* assents, the deed was not only invalid under the Bankruptcy Act, but was nothing more than an escrow.

KELLY, C.B., and CLEASBY, B., held that the deed was good at common law to pass the property to the plaintiff, and that the facts proved did not amount to evidence that it was delivered as an escrow.

Rule discharged.

Exchequer.
Jan. 26, 28. } GILPIN *v.* COHEN AND BENJAMIN.

Arrest on Ca. Sa.—Privilege from Arrest.

The defendant Benjamin, having been charged before a police magistrate with an offence under Russell Gurney's Act (embezzling partnership moneys), was remanded on his own recognisances. On leaving the Court he was arrested on a *ca. sa.* in this action, in which judgment had been obtained against himself and his partner.

Besley now moved for a rule to discharge Benjamin from custody, on the ground that under the circumstances he was privileged from arrest.

Baylis, showing cause in the first instance, contended that the privilege in question did not apply to persons charged with criminal offences.

Cur. adv. vult.

KELLY, C.B., CHANNELL, B., PIGOTT, B., and CLEASBY, B., held that under the circumstances the defendant was privileged from the arrest.

Rule absolute.

Court of Criminal Appeal.

Coram BOVILL, C.J., BYLES, J., CHANNELL, B., PIGOTT, B., LUSH, J.

Court for Crown Cases Reserved.
Jan. 29. } REGINA *v.* SUMMERS.

Indictment—Misdemeanour—Count for previous Conviction of Felony—27 & 28 Vict. c. 47, s. 2.

Case reserved by the learned Deputy Assistant Judge at the Middlesex Sessions.

The prisoner was convicted of the misdemeanour of having inflicted grievous bodily harm on a policeman. After the jury found the prisoner guilty, some policemen and prison officers were called, and being sworn, said that the prisoner had been previously convicted of felony, but no record of such conviction, nor any certificate thereof, was produced. The indictment did not charge a previous conviction. The learned Deputy Assistant Judge considered that under these circumstances he could only treat the conviction as a conviction for the misdemeanour, without any previous conviction for felony, and sentenced the prisoner to five years' penal servitude.

The questions reserved were: whether that sentence under the circumstances was or was not correct; and, secondly, whether the statute 27 & 28 Vict. c. 47, s. 2, authorises the Court to pass a sentence of seven years' penal servitude, whether a previous conviction of felony is alleged in the indictment or not.

That statute enacts that when any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded in such case shall be a period of seven years.

No counsel appeared.

The COURT held the sentence right, and confirmed the conviction.

Conviction affirmed.

Court for Crown Cases Reserved.
Jan. 29. } REGINA *v.* HILBERT.

Abduction—Casual Meeting of a Girl in the Street—Possession of Parent—24 & 25 Vict. c. 100, s. 55.

Case reserved by LUSH, J.

The prisoner casually met in the street a girl under the age of sixteen years, and after a little persuasion induced her to go with him by rail to M. Upon arriving there he took her to a public house and seduced her. He then accompanied her back to where he had met her, and parted with her in the same street. The girl lived at home with her parents, but the prisoner had made no inquiries, and did not know who the girl was, or even whether her parents were living.

No counsel appeared to argue the case.

The COURT held (PIGOTT, B. *hæsitante*) that the conviction of the prisoner for having taken the girl out of the possession of and against the will of her father, contrary to 24 & 25 Vict. c. 100, s. 55, was bad.

Conviction quashed.

Probate and Matrimonial Causes.

Probate. Jan. 6. } *In the goods of* D. F. DE ANGUELO Y URRUELA.

Foreign Will—Executor Abroad—Mistake in Oath as to Value of Property—Property Re-sworn by Agent—55 Geo. III. c. 184, ss. 38, 41—Practice.

The testator, Don D. F. de Anguelo y Urruela, died domiciled in Guatemala on or about June 13, 1866, leaving a will and codicil, in which he appointed an executor. The deceased was possessed, at the time of his death, of considerable personal estate in this country. The executor forwarded attested copies of the instruments for probate, and swore the value of the property as under 32,000*l.* It turned out that this was a mistake, the real value of the property being 40,000*l.*

C. A. Middleton moved the Court to allow probate to go on, the value of the property being re-sworn by the agent of the executor in this country, and referred to sections 38 and 41 of the 55 Geo. III. c. 184.

Sir J. P. WILDE said that the mistake was easily explained by the fact that the affidavit was made at the other side of the globe. The Court was not, however, restricted to the affidavit of the executor, but, under section 38 of the 55 Geo. III. c. 184, might receive an affidavit from 'some other competent person or persons' as to the value of the property. The grant might therefore go, the value of the property being re-sworn as proposed.

Probate. Jan. 26. } *In the Goods of* JOHN HUTLEY.

Testamentary Suit—Suit Compromised and Will Pronounced for—Next-of-kin in Australia not cited—Estate in course of Administration in Chancery—Citation to Executors to bring in Probate—Affidavit to Lead—Practice.

John Hutley, the deceased, died in August, 1866, leaving a will, in which he appointed Frances Maria Hutley, Percival Turner, and Michael Grimston his executors, to whom probate in common form was granted in September 1866. The probate was called in in January 1867 by Stephen Hutley, the natural and lawful brother and heir-at-law of the deceased. The executors propounded the will in a declaration, the suit proceeded, a compromise was agreed to by the parties at the trial, which took place on July 25, 1867, and the Court pronounced for the validity of the will. The compromise was confirmed by the Court of Chancery, in which the estate was being administered. The personal property was sworn under 90,000*l.*, and large sums were already paid out by the Court of Chancery in the course of administration.

John Grimston and Henry Grimston were the lawful nephews of the deceased, and, with Stephen Hutley, the only next-of-kin and the only persons entitled in distribution, in the event of the deceased having died intestate. John Grimston died in August 1868. Henry Grimston was in Australia at the time of the death of his uncle. He was not cited by the executors, and knew nothing of the suit in the Court of Probate, or the proceedings in Chancery (in which he was mentioned and described as then residing in Hobart Town, in the colony of Australia), until October or November 1868, when he received a communication from Mr. Nunn, a friend in England. He at once forwarded a power of attorney, authorising Nunn to take such steps as were necessary for the protection of his interests. Before the administration in the Court of Chancery could be stayed, it was requisite that proceedings should be instituted in this Court to call in the probate of the will, and to have it declared null and void.

Dr. Spinks (with him *E. C. Clarkson*) moved the Court to allow the citation to the executors to bring in the probate to issue on the affidavit of Mr. Nunn, as agent for Henry Grimston. Mr. Nunn was in a position to make the necessary averments, and before an affidavit could be received from Australia the property might be all paid away.

Sir J. P. WILDE said that the affidavit of Mr. Nunn would, under the circumstances, suffice to lead the citation.

Motion allowed.

Divorce and Matrimonial Causes. Jan. 20. } MORPHELT *v.* MORPHELT.

Restitution of Conjugal Rights—Cruelty charged by Wife—Wilful Communication of Disease—Onus Probandi—Absence of actual Proof—Medical Testimony—New Trial—Costs.

The husband petitioned for restitution of conjugal rights. The wife answered charging cruelty, viz., the wilful communication of an infectious disease. The petitioner denied the charge.

The facts were these:—The parties, who were both young, were married on June 9, 1866; the cohabitation ceased in the following September. In January 1867, the husband filed his petition for restitution, and in February 1867, the wife was found to be affected with secondary syphilis. She therefore filed her answer, charging cruelty, and the husband almost immediately afterwards submitted himself to examination by medical men. On the trial, which took place in the sittings after Trinity Term, before the JUDGE-ORDINARY, by a special jury, the petitioner swore that he never had been diseased; the respondent that she had not been unchaste before marriage, or unfaithful after it. No trace of disease was found on the petitioner by the medical men who examined him; no definite conclusion was capable of being drawn from the evidence as to the form in which the person who infected the respondent must himself have been suffering at the time; and there was

further, a conflict of testimony as to the period and form in which hereditary syphilis manifested itself.

The verdict was for the respondent. The rule *nisi* for a new trial, obtained by the petitioner, was argued in Michaelmas Term before the full Court (the Judge-Ordinary, Willes, J., and Cleasby, B.)

G. Parry (*Serjeant*), *Dr. Tristram*, and *Lush*, for the petitioner, and

J. D. Coleridge, *Dr. Spinks*, and *A. S. Hill*, for the respondent, and

Judgment was reserved.

The Court now held (Willes, J., dissenting) that it devolved upon the respondent to establish affirmatively that the petitioner knew he had disease, and that intercourse with his wife would be distinctly dangerous; that in the absence of actual proof of the existence of disease in the petitioner, it was incumbent upon the respondent, in the medical evidence adduced in support of her charge, to lay the foundation for a scientific conclusion which should take the place of such proof, from which the jury could argue with reason, first to the charge of knowledge, and through that to the charge of wilfulness; and that there being a defect of proof in these respects, the evidence was insufficient to support the finding of the jury.

Rule absolute for a new trial; respondent's costs of previous trial to be first paid by petitioner.

Divorce and Matrimonial Causes. Jan. 20. } Mathew *v.* Mathew.

Desertion—Decree Nisi—Protection Order—Practice.

The wife petitioned for a dissolution of the marriage on the ground of adultery and desertion. Both charges were proved. In the course of the hearing it was stated that the respondent, who did not appear, was living at Boulogne.

Dr. Spinks (*Pritchard* with him), for the petitioner, asked the Court to grant also a protection order to the petitioner. The order would date from the date of the desertion; the decree *nisi* from the day it was pronounced.

The Judge-Ordinary: The difficulty that occurs to me is as to the mode in which the application should be made. If the whereabouts of the husband be known, the Court requires that he should be served with notice. No doubt he has been charged with desertion, and has not chosen to answer it, but then he did not know that an application of this kind would be also made. You had better make the application in the usual form, and serve it upon the husband. In the meantime, perhaps, I had better suspend the decree.

The petitioner, on consideration, did not deem the order necessary, and the Court granted (Jan. 21) a decree *nisi* with costs.

High Court of Admiralty.

Admiralty Court. Jan. 27. } The Margaret and Jane.

Salvage—No Jurisdiction—Arrest—Costs and Damages.

This was a cause of salvage instituted on December 8, 1868, by the owner, master, and crew of the vessel Ezra against the vessel Margaret and Jane, with her cargo and freight, in the sum of 2,500*l*. The salvage service was rendered on November 24, and on December 3 the Receiver of Wreck reported the value of the cargo and ship to be 746*l*. On December 18 the salvors applied for an appraisement of the vessel, and on January 14 this year they formally declared that they proceeded no further in the suit.

Butt, for the owners of the Margaret and Jane, applied to the Court to condemn the salvors in the costs and damages, on the ground that at the time when they instituted the suit they were aware that this Court had no jurisdiction, the value of the property salved being under 1,000*l*.

E. C. Clarkson contra.

Sir R. J. Phillimore.—It is admitted that the salvors must be condemned in costs, the only question being as to the damages. It has not been usual for this Court to make such a decree. The case of the Evangelismos, before the Privy Council, has been cited, in which their Lordships said that 'there is no reason in this case for giving damages. Undoubtedly, if the arrest of the ship is an act of *mala fides*, or of that of *crassa negligentia* from which the law implies malice, the Court of Admiralty would be justified in giving damages, as in an action brought at common law damages might be obtained. In the Admiralty Court, however, the proceeding is very convenient, because in the action in which the main question is disposed of damages may be awarded.' In this case there is certainly no *mala fides*, and the salvage of the derelict vessel, for such it was, appears to have been one of considerable merit, and it has happened that the officer of the Court has appraised vessels at a higher value than the Receiver of Wreck. I think it would be harsh, therefore, to say that when the commission for the appraisement in this case was taken out on December 18 that the salvors were guilty of *crassa negligentia*, but I think they must have been aware within a short period of the time of taking out that appraisement that the value fixed by the Receiver of Wreck was substantially correct; and I shall condemn them in costs altogether and in damages from December 22 to the time when the vessel might have been released—viz. Jan. 14.

Decree accordingly.

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Courts of Equity.

Lord Hatherley, L.C. Jan. 26, 28. } Tennant *v.* Trenchard.

Trustee—Mortgagee—Their Characters united in same Person—Foreclosure—Sale—15 & 16 *Vict. c.* 86, *s.* 48.

Mrs. Tennant, the mother of the plaintiff, Mr. Charles Tennant, was devisee of certain estates under the will of her husband George Tennant. In July 1832, after his death, she bought another estate. In 1835, she conveyed both properties to her sons as trustees, of whom the plaintiff Charles Tennant was one. The eldest surviving trustee was to have the sole management of the property, and to be entitled at his discretion to act in the management with as full powers as the settlor could herself have acted. Under this settlement Mrs. Tennant took a life estate, and the plaintiff became entitled, subject to her life estate, to a life estate in two sevenths. At the date of the settlement the estates comprised in George Tennant's will were mortgaged for 50,000*l.* to Messrs. Child, and the settlement provided that any one of Mrs. Tennant's children who should hold any written acknowledgment by her of advances made to her should be entitled, subject to the mortgage to Messrs. Child, to 'a charge by way of mortgage,' to take effect over the estates next after the mortgage to Messrs. Child. The debt to Messrs. Child was subsequently reduced to 42,500*l.* by payments, and a neighbouring property called the Compton estate was bought for 12,000*l.* by the plaintiff, and treated by him and his then surviving co-trustee and Mrs. Tennant as subject to the trusts. The 7,722*l.* 0*s.* 5*d.* used to reduce the mortgage debt and interest, and the 12,000*l.* were advanced by the plaintiff; and Mrs. Tennant, who died in 1850, had in that year given a written acknowledgment that a balance of 56,820*l.* 11*s.* was due from her estate to him. In 1845 the estate purchased by Mrs. Tennant in 1832 had been mortgaged by her for 8,000*l.*; and in January 1867 Davidson, the transferee of the mortgage, was redeemed by the plaintiff, who had now become the surviving trustee of the settlement of 1835. In February 1867 he instituted the present suit, against those interested jointly with himself under the settlement of 1835, for foreclosure of all the estates, both those devised and those purchased. Several of the defendants resisted, and desired the Court, in the exercise of its discretion, to direct a sale instead of a foreclosure. They argued that the plaintiff had, by the deed, only a charge, not a mortgage; and also that, as a trustee, he was not entitled to a decree for foreclosure. Giffard, V.C., was of opinion that the plaintiff's position as trustee could not deprive him of his rights as mortgagee to foreclose those shares of the estate of which he was not himself tenant for life. His Honour, however, was willing to exercise his discretionary power of ordering a sale instead of making a foreclosure decree, if it could be shown that a sale was likely to produce a surplus after satisfying the charges, and if the defendants would pay a sum of money into Court to indemnify the plaintiff against the expense of an abortive attempt to sell; but he declared that the order for sale must be without

prejudice to the plaintiff's right to foreclose all the property except the Compton estate, as to which he should direct inquiries. Certain of the defendants appealed.

Sir R. Palmer, *Mr. Freeling*, and *Mr. Speed* appeared for the appellants; and

Mr. E. K. Karslake and *Mr. W. W. Karslake* for the plaintiff.

Without calling for a reply,

The Lord Chancellor reluctantly came to a contrary conclusion to Sir George Giffard on the construction of the deed of settlement. He was of opinion that it was adverse to the objects manifestly contemplated by Mrs. Tennant in executing such a settlement to hold that by the expression 'a charge by way of mortgage' she intended to confer on any of the trustees the power of obtaining a mortgagee's right to forclose. She could not have intended a result that would frustrate the object of the settlement (which was to provide for the maintenance of the whole family out of the estate) and annihilate the trusts. All that could be supposed to have been meant by Mrs. Tennant was to give such of the trustees as should advance money for the benefit of the estate, not a mortgagee's right, but a charge *simpliciter*; and a charge *simpliciter* would entitle only to repayment by means of a sale. The vast powers which the managing trustee for the time being had under the deed contained no power of mortgaging. But His Lordship preferred not to rest his decision on this view of the construction of the deed. There was no proof that the plaintiff had not done his duty as trustee by the estate; but, having been possessed of such extraordinary powers as managing trustee, he could not successfully insist before this Court on the exercise of a right by which his interest might be put in opposition to his duty. For the Court to permit this would be particularly unjust in this case, on account of the grant to the plaintiff as sole managing trustee of powers which made the rest of the *cestuis qui trustent* altogether defenceless as against him. The decree must be varied by inserting directions for a sale at chambers. The costs of the appeal would be costs in the cause.

Lord Hatherley, L.C. } Moxon *v.* Bright.
Jan. 29.

Account in Equity—Agent.

This was a suit by the patentees of an invention for improved looms, against Messrs. Bright & Co., who were carpetweavers, and Mr. Hall, who was a manufacturer of looms. The bill asked for an account of profits derived by Messrs. Bright from their use of the patent, the validity of which, however, was not admitted by the defendants nor proved by the plaintiffs. It also prayed against Hall for an account of all royalties received by him on the sale of looms. The exact terms on which he received these royalties were disputed; but, according to the judgment of the Court, he was to pay to the plaintiffs a royalty of 20*l.* for each loom he manufactured and sold, being himself restricted as to the price at which he should sell the loom.

The defendant Hall denied that anything was owing in respect of these royalties. As to the looms made by Hall and used by Bright & Co., the patentees made their own arrangements as to royalty with Bright & Co. What the agreement between the plaintiffs and Bright & Co. was was disputed.

V.C. Giffard had dismissed the bill with costs, but without prejudice to an action at law or a suit in equity, founded strictly upon the plaintiffs' right as patentees.

Mr. J. H. Palmer and *Mr. Hastings*, for the plaintiffs, who appealed.

Mr. Druce and *Mr. Hemming*, for Messrs. Bright & Co., were not called upon.

Mr. Kay and *Mr. Hadley*, for Mr. Hall, contended that there was no case for an account in equity.

The Lord Chancellor said that as to Messrs. Bright & Co., the case was as clear as possible that the plaintiff's rights, if any, were at law. As to Mr. Hall, there was some perplexity, the exact terms on which he was entitled to use the plaintiff's invention being somewhat uncertain, no formal agreement having been made, but it depending to a great extent upon conversations. He thought, however, that as Mr. Hall did not make contracts on behalf of the plaintiffs with purchasers of looms, but only rendered himself liable to pay a sum of money as royalty upon each loom that he sold, there was no case for an account in equity against him. The appeal was therefore dismissed with costs.

Stuart, V.C. } De Nicols *v.* Abels.
Dec. 27.

Landlord and Tenant—Covenant—Injunction.

This was a suit by a landlord against his tenant to restrain a breach of covenant; the bill prayed for an injunction equivalent to a mandatory injunction, to restore the premises comprised in the lease, and also restraining future breaches. The covenant was not to alter the elevation of the shop demised by the lease, or the external decorations, or the iron railings in front thereof, and not to make any addition thereto.

The defendant had altered the shop by taking away part of the shop window and substituting in its place a doorway, thus forming a new entrance from the street.

Mr. E. K. Karslake and *Mr. Hadley* for the plaintiff.

Mr. Green and *Mr. Vilkers* for the defendant.

His Honour thought that what had been done was a clear breach of the covenant, and he granted an injunction in accordance with the prayer of the bill.

Stuart, V.C. } *Re* The Common Law Procedure Act, 1854, s. 17, and *Re* The Arbitration between the Rev. George Drury and the Rev. Joseph Leycester Lyne.
Feb. 9.

Statute 3 & 4 Wm. IV. c. 42, s. 39—The Common Law Procedure Act, 1854, *s.* 17—*Submission, not under Seal—Revocation of by Deed—Motion to make the Submission a Rule of Court, refused with Costs.*

These matters came on upon a motion on behalf of Mr. Drury, that an agreement, in writing, but not under seal, dated March 31, 1868, and made between Mr. Drury of the one part, and Mr. Lyne of the other—whereby it was agreed that certain questions and disputes then pending between those gentlemen, with reference to the Elm Hill Monastery at Norwich, and the charges and incumbrances therein, and other matters, should be referred to the arbitration and decision of the Rev. Pascoe Grenfell Hill and the Rev. Edward Stuart, or their umpire—might be made an order of this Court under the Common Law Procedure Act, 1854, s. 17. That submission having been entered into, the arbitra-

tors, in June 1868, proceeded to the making of their award; and the matter went on in due course till November last, when Mr. Lyne refused to take any further steps in it. On January 4, 1869, he executed a deed, under his hand and seal, revoking the submission so far as he was concerned.

Mr. Greene and *Mr. Francis Webb* appeared in support of the motion, and contended that the case was within the spirit if not the letter of the 3 & 4 Wm. IV. c. 42, s. 39. By that section it was enacted that 'the power and authority of any arbitrator or umpire appointed . . . . . *by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any Court of Record, shall not be revocable by any party to such reference, without the leave of the Court,* . . . . . *which shall be mentioned in such submission,* or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference.' The submission in this case did not, in fact, contain such an agreement as was mentioned in that section; but by the Common Law Procedure Act, 1854, s. 17, it was enacted that 'every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior Courts of law or equity at Westminster, on the application of any party thereto, *unless such agreement or submission contain words purporting* that the parties intend that it should not be made a rule of Court,' &c. The submission contained no words purporting that it was not to be made a rule of Court, and therefore Mr. Drury was now entitled to the order for which he moved.

Mr. Dickinson and *Mr. Herbert Smith*, for Mr. Lyne, were not called upon.

STUART, V.C. was of opinion that the case was not within the 3 & 4 Wm. IV. c. 42, s. 39. Such a submission as the present one was clearly revokable, under the old law, by either party; and, as a matter of fact, it had been revoked by deed. The Common Law Procedure Act, 1854, s. 17, contained nothing to authorise this Court to make an agreement to refer matters to arbitration, not under seal, and which had been afterwards duly revoked by deed, a rule or order of this Court. The motion was therefore refused, with costs.

Courts of Common Law.

Exchequer Chamber. (*Appeal from Q.B.*) Feb. 2. } BAXENDALE AND OTHERS *v.* THE GREAT EASTERN RAILWAY COMPANY.

Common Carriers—Liability of—Special Contract—The Carriers Act—11 *Geo. IV. and* 1 *Wm. IV. c.* 68, *ss.* 1, 7.

The defendants carried on the business of carriers from Rotterdam to London *vid* Harwich, the sea portion of the journey being performed by steamships, and the land portion by railway. A case of pictures was delivered to the agents of the defendants at Rotterdam, and the agents signed a bill of lading, by which it was stated that the goods were to be delivered in good order and condition 'at the port of London *vid* Harwich (the act of God, the Queen's enemies, pirates, restraint of princes, rulers, and people, vermin, jettison, barratry and collision, fire on board, in hulk or craft, or on shore, and all accidents, loss, and damage whatsoever from machinery, boilers and steam, and steam navigation, or from perils of the seas and rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, as also railway accidents, being excepted). The case of pictures was lost in course of transit from Harwich to London, and, an action having been brought against the defendants by the plaintiffs, they pleaded in substance that they were common carriers; that, at the time of the delivery of the goods to them, the nature and value of them were not declared to them, and, therefore, that they were protected by that Act. The Court of Queen's Bench made a rule absolute to enter a verdict for the defendants on the ground that the plea was proved. The plaintiffs appealed against this judgment.

Murphy (*Edwyn Jones* with him), for the plaintiffs, contended that, as the defendants had entered into a special contract, they were prevented by section 6 from claiming the protection of the Carriers Act, and that the plea was disproved by the bill of lading.

C. Wood contra.

Per Curiam (KELLY, C.B., CHANNELL, B., BYLES, J., KEATING, J., PIGOTT, B., MONTAGUE SMITH, J., and CLEASBY, B.)—The judgment of the Court below must be affirmed. The defendants are entitled to the protection afforded by the Act, although they have made a special contract with a view to further protecting themselves from liability.

Judgment affirmed.

Note.—There was a demurrer to the plea, upon which the Court below had given judgment for the defendants, and error having been brought, that judgment was also affirmed.

Exchequer Chamber. (*Appeal from C. P.*) Feb. 4. } THE METROPOLITAN BOARD OF WORKS *v.* THE METROPOLITAN RAILWAY COMPANY.

Compensation—Easement—Sewer—Statutory Powers to Construct Sewer—Right to Lateral Support of Adjoining Land.

Appeal from the decision of the Court of Common

Pleas, on a special case reported 37 Law J. Rep. C.P. 281. The appeal was argued by

Sir John Karslake (*Raymond* with him) for the appellants, and by

The *Solicitor-General* (*Horace Lloyd* with him) for the respondents.

The respondents made an excavation in their own land for the purposes of their railway, which they were authorised to construct. The excavation was about sixteen feet below the bottom of a sewer of the appellants on adjoining land, and although such excavation was properly and carefully made, so as to have sufficiently supported such adjoining land in its natural position, it did not with the additional weight upon it of such sewer, and the consequence was that the sewer fell in and was damaged. The sewer had been constructed less than twenty years previously by the Commissioners of Sewers, under the 11 & 12 Vict. c. 112. The question was whether the respondents were liable to make compensation for the injury the sewer had sustained.

The Court (Kelly, C.B., Channell, B., Mellor, J., Pigott, B., and Hannen, J., Cleasby, B. *dubitante*) affirmed the decision of the majority of the Court below on the ground that the right to the support of the adjacent land for the sewer had not been acquired by necessary implication, and that therefore, as there was not such right of support, the appellants were not entitled to claim compensation for the injury to the sewer.

Decision affirmed.

Common Pleas. Feb. 5. } Brett *v.* Jackson.

Bankruptcy—Proveable Debt—Annuity—12 *&* 13 *Vict. c.* 106, *s.* 175.

The question in this case was whether an annuity was proveable under 12 & 13 Vict. c. 106, s. 175. The annuity was to cease if the annuitant refused, neglected, failed, or became incapable of performing certain conditions, which were, amongst others, that he should do his best to promote the grantors' business, give such personal attendance to it as should be reasonably required, and not set up business for himself; and the deed contained a provision for submitting disputes to arbitration.

Lord for the plaintiff.

Lanyon for the defendant.

The Court held that the annuity was not proveable.

Common Pleas. Feb. 5. } Peplow *v.* Richardson.

Sunday Trading—Sale of Beer, &c.—11 *&* 12 *Vict. c.* 49.

The appellant had been convicted under 11 & 12 Vict. c. 49, for keeping open his house for the sale of liquors on a Sunday during prohibited hours. And the question was whether a certain person A., to whom liquor was sold, was a *bona fide* traveller. The appellant kept a public house, at which there was a spring of medicinal waters; persons were in the habit of walking there to take the water, and then have refreshment. And A. had walked about 2½ miles to the house (though whether he had taken the waters did not appear), and had been supplied with beer.

Lanyon for the appellant.

No one appeared for the respondent.

The Court held that on the facts found by the justices, they must take it that A. did not go to the house simply to drink beer, but that the refreshment was subsidiary to another legitimate object, and that this being so the decided cases gave them no option but to quash the conviction.

Conviction quashed.

Exchequer Chamber. (*Appeal from Exch.*) Feb. 9. } Siner and Wife *v.* The Great Western Railway Company.

Negligence—Railway Company—Want of Proper Means of Alighting from Train.

This was an appeal from the decision of the Court of Exchequer, making absolute a rule to enter a nonsuit, on the ground that there was no evidence for the jury. The facts of the case were briefly as follows:—The plaintiffs were passengers in an excursion train of the defendants. On arriving at Rhyl station, which was their destination, the train being longer than the platform, some carriages, in one of which the plaintiffs were, stopped at a point beyond the platform. The carriage in which plaintiffs were was constructed in the ordinary way, with an iron step about three feet from the ground, and a footboard immediately under, and on each side of the step extending along the carriage. The only way of alighting was either by jumping from the iron step to the ground, or by stepping first on one side of the iron step on to the footboard, and so to the ground. It was alleged by the plaintiffs that alighting from the carriage where it was was both awkward and dangerous, and it appeared clear that it was to a certain extent inconvenient as compared with descent at the platform. The plaintiffs were neither told to get out nor to remain in the carriage. The male plaintiff looked out of window, but none of the company's servants were at hand; several other passengers got out of carriages on either side, and after waiting a few minutes he alighted. His wife then, taking both his hands, jumped as carefully as she could from the iron step to the ground, and in so doing received the injuries for which the action was brought. No offer was made to back the train so as to bring the carriage to the platform, but no request was ever made to the company's servants to do so. It was admitted that the platform at the Rhyl station was not inadequate to the usual traffic of the place.

Jelf (with him *J. O. Griffits*) for the plaintiffs.

Powell for the defendants.

Held, affirming the decision of the Court below, *per* Byles, J., Mellor, J., Montague Smith, J., and Hannen, J., *dissentiente* Keating, J., that the accident arose from the acts of the plaintiffs, and that there was no evidence of negligence to go to the jury.

Judgment affirmed.

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Privy Council.
Feb. 2. } *In re* D'Silva.

Present, Lord Chelmsford, Sir J. Colvile, Sir J. Napier, and Sir Laurence Peel.

This was a petition for special leave to appeal from an order of the Recorder of Moulmein.

The petition stated that the petitioner was an advocate practising in the Recorder's Court. That the rules of the Recorder's Court provided that the Recorder might strike an advocate off the Rolls 'for dishonourable or disgraceful conduct.' That the petitioner caused an anonymous letter to be sent to the Recorder, alleging that a person who was about to apply for admission to the Rolls of the Recorder's Court had not complied with an order that he should be examined. That the Recorder directed an inquiry to be made into the authorship of this letter, and examined the petitioner and others as witnesses. That the petitioner offered to give up the name of the author in private to the judge, but denied his having himself been party to the writing of the letter. The Recorder found, as a fact, that the petitioner was either the author of the letter or privy to the writing of the letter. He then, after giving the petitioner an opportunity of showing cause, revoked his license as an advocate.

Mr. J. D. Bell contended against the propriety of removing an advocate under such circumstances, and relied on an apology having been tendered.

Lord Chelmsford.—As to the finding on the facts, their Lordships think that the Recorder was the best

judge; and as the facts were found against the petitioner, his conduct clearly came within the rule of Court. The mere question whether so severe a punishment was called for is not a matter their Lordships will consider by giving leave to appeal.

Leave refused.

Privy Council. Feb. 2, 6. { Ranee Surno Moyee (Appellant), Kisto Nauth Roy and Others (Respondents).

Present, Lord Chelmsford, Sir J. Colvile, Sir J. Napier, and Sir Laurence Peel.

This was a petition praying that the Judicial Committee would recommend Her Majesty to cancel or amend an order made upon the *ex parte* hearing of an appeal.

The petition stated that on or about August 19, 1864, the petitioner obtained a decision in his favour from the High Court of Judicature at Fort William in Bengal in a suit brought by the appellant Ranee Surno Moyee against the respondent and others. That the said Ranee Surno Moyee appealed to Her Majesty in Council from the said decree, but various proceedings were taken in India with a view to compromise the said suit and render the said appeal unnecessary. That in or about the month of September, 1867, the respondent instructed his agent in England to appear for him in the said appeal, and take all the necessary steps on his behalf with a view of maintaining the judgment of the High Court of Bengal. That on or about October 23, 1867, the respondent's said agents attended at the Council Office, and made inquiry with reference to the said appeal, and were thereupon informed that the record in the said appeal had not arrived in this country. That the respondent's agents thereupon wrote a letter to the registrar of the Judicial Committee, and stated that they were instructed on behalf of the respondent in the appeal, and requested notice when the transcript of proceedings arrived in this country, and that an appearance should be entered in due time on behalf of the respondent. That in the month of October, 1867, the respondent, by his agents, retained counsel on his behalf. That the progress of the said appeal was delayed by further attempts to compromise the same in India; but in the month of September, 1868, the respondent again instructed his agents in England that negotiations for compromise were broken off, and that the case must be taken to a hearing; and the respondent at the same time remitted funds to his agents for the purpose of having the case argued on his behalf. That the respondent's agents, in the month of October 1868, again attended at the Council Office and made inquiry as to the said appeal, and were informed that the record in the said appeal had not arrived in England, and the respondent's agents wrote to the respondent to this effect. That the said appeal was, notwithstanding the long inquiries and diligence on the part of the respondent, heard *ex parte*, in the absence of the respondent, in the month of December, 1868, and judgment was given on behalf of the appellant. The petition then alleged that, in the certificate of the registrar of the High Court of Bengal accompanying the record, the title of the said appeal was incorrect, and that the appeal was entered incorrectly in the index at the Council Office; and that the appellant having had some appeals, the officers at the Council Office were misled thereby. That the respondent had used every diligence to obtain a hearing of the appeal on his behalf.

Mr. Manisty and *Mr. Doyne* submitted that the hearing of the appeal *ex parte* has been under such circumstances that the petitioner ought to be allowed to be heard upon the said appeal.

Their Lordships took time to consider this question.

Feb. 6.—Lord Chelmsford: Their Lordships are of opinion that they ought not to recommend Her Majesty to cancel her order made in this appeal.

Courts of Equity.

Stuart, V.C. Feb. 11. } Nanson *v.* Barnes.

Customary Hold—Descent broken.

One of the questions which arose in this suit was whether the descent of certain customary-hold lands, holden of the manor of Botchardgate in Cumberland, had been broken. By the custom of the manor lands holden thereof pass not by surrender only, but by a deed of bargain and sale, and surrender and admittance: and lands derived from paternal ancestors descend in the paternal line, and those derived from maternal ancestors in the maternal line. It appeared from the evidence of the steward of the manor that lands of this tenure not being devisable until the passing of the Wills Act, it was the practice for an owner desirous of disposing of such lands by will to convey them by bargain and sale, and surrender, and admittance to a trustee, who by another deed declared that he would stand seized thereof upon trust for such persons as the grantor should by will appoint, and in default for him his heirs and assigns. The grantor then made his will, and after his death the trustee conveyed by bargain, and sale, and surrender, and admittance to the devisee.

George Blamire having been admitted tenant of certain customary lands of this manor as customary heir to his mother, by an indenture dated May 2, 1832, conveyed them in the customary manner to Nanson, his heirs and assigns, and he also duly surrendered them to Nanson, who was thereupon admitted tenant; and by another indenture, executed on the same day, it was declared that Nanson and his heirs should stand possessed of the lands upon trust for such persons as George Blamire should by deed or will appoint, and subject thereto in trust for George Blamire, his heirs and assigns for ever, according to the custom of the manor.

George Blamire died intestate, without having appointed by deed, and it was now contended that, by the two deeds above mentioned, George Blamire had 'departed with' his whole estate and interest, and had ac-

quired a new estate by purchase; and thus, the course of descent having been broken, the lands descended to the customary heir of George Blamire in the paternal line.

Mr. Greene and *Mr. Deere Salmon* for the plaintiffs in the suit.

Mr. Dickinson and *Mr. Fry* for the heirs *ex parte paterna.*

Mr. Charles Hall and *Mr. Mounsey* for other parties.

Stuart, V.C. held that the deeds in question, so far from divesting George Blamire of his old estate and giving him a new estate by purchase, had merely given him a more complete dominion over the estate he already possessed, and had not the effect of breaking the descent of it.

Stuart, V.C. Feb. 15. } Stutely *v.* Kepp.

Will—Construction—Legacies and Annuities—Abatement—Interest.

The question in this case was whether both the legacies and annuities bequeathed by the will of Martin Stutely, the testator in the suit, were to abate proportionately, or the legacies only?

The facts were shortly these:—

The testator by his will, dated the 26th of August, 1859, devised and bequeathed the residue of his real and personal estates to trustees for sale, and for payment out of the proceeds thereof, of certain legacies and annuities to the parties in his will named. He directed that the legacies and annuities were to be paid as soon as the proceeds from the sale and realisation of his estates would admit; and further, that if there should not be sufficient assets, '*the several legacies*' should be proportionately reduced. He further declared that his trustees should have full power to charge the shares of his children (the annuitants), or their issue, with the costs of any litigation caused by them; and in order further to prevent any litigation, directed that the legacies, annuities, and bequests in his will contained were intended to be in satisfaction of all claims upon him or his estate. The testator died on April 5, 1860, and his assets were realised, but did not prove sufficient to pay his debts and the legacies and annuities in full.

Mr. M'Naghten appeared for the plaintiff in the suit.

Mr. Prendergast, Mr. Faber, and *Mr. J. N. Higgins,* for the legatees, contended that there was nothing in this will to take it out of the ordinary rule in such cases, and that the legacies and the annuities must all abate rateably.

Mr. Heming, for the annuitants, insisted that they had a priority over the legatees, because, first, the annuitants were members of the testator's family, whom it was to be presumed he would benefit rather than these legatees, who were strangers; and secondly the testator, who well knew the distinction between legacies and annuities, had specially confined the abatement to the legacies.

Mr. H. R. Young appeared for the defendant, Mr. Kepp.

Stuart, V.C., referring to the clause in the will as to the testator's desire to prevent all litigation in his family, and in which clause he had placed the legacies and annuities in the same class with the bequests in his will, said that upon the whole context of the will the legacies and annuities must all abate rateably.

Mr. Heming then submitted that, as the annuities were treated as legacies, the annuitants were entitled to interest on them.

Stuart, V.C., thought there might be cases in which a departure from the inflexible rule of the Court, that interest was never allowed on annuities, might be proper; but the present case was not one in which the rule could be departed from, and refused the application accordingly

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Malins, V.C. Feb. 10. } Hayward *v.* Smith.

*Partition—Sale—*31 *&* 32 *Vict. c.* 40*—Unequal Shares—Costs—*19 *&* 20 *Vict. c.* 120*—Conduct of Sale by the Court given to Trustees.*

This suit, in which a decree for a sale had been made under the authority of the Partition Act of 1868, 31 & 32 Vict. c. 40 (see *ante,* 29), was now mentioned again upon a difficulty raised by the registrar in drawing up the decree.

The Vice-Chancellor had directed the sale to be made by the trustees, but the registrar entertained a doubt whether the Court should permit the sale to be made without the usual directions in Chambers, and without bringing the purchase money into Court, whether in fact the sale could properly be carried out without the medium of the Court.

Mr. T. A. Roberts, in asking the Court to confirm the decree made, referred to the Leases and Sales of Settled Estates Act, sections 23, 24 & 25, the provisions of which were expressly extended to the Partition Act of 1868.

The Vice-Chancellor confirmed the decree.

Malins, V.C. Feb. 12. } *Re* Tibbits' Settled Estates.

*Sale of Settled Estates—*19 *&* 20 *Vict. c.* 120*, s.* 37*—Married Woman, separate Examination of, dispensed with.*

This was a petition to obtain the sanction of the Court to the sale of certain estates under the Settled Estates Act. The sale was shown to be highly advantageous. The only question was whether the Court would dispense with the separate examination of a married lady living with her husband at Nice, who was entitled to a portion charged upon the estate.

Mr. Martelli, for the trustees, referred to Tabley's Settled Estates, 11 W. R. 936.

Mr. Stuart, for the lady and her husband, consented.

Malins, V.C. authorised the sale, without requiring the lady's separate examination.

Malins, V.C. Feb. 12. } *Re* Bailey's Trusts.

*Judgment Debt, Registration of, without Execution—Charge upon Lands—*27 *&* 28 *Vict. c.* 112.

James Bailey, having in 1865 and 1866 mortgaged certain leaseholds, situate in Middlesex, to the trustees of a benefit building society, in the following year mortgaged his equity of redemption in the same premises to Edward Hart. In 1868 Bailey executed an inspectorship deed, which was duly registered under the Bankruptcy Act 1861. In the meantime the trustees had exercised their powers of sale, and, after retaining the moneys due upon their mortgages, paid the balance into Court.

Bailey and his inspectors now petitioned for payment out, subject to Hart's claim, which was not disputed.

The petition stated that there were several judgment creditors against Bailey's estate whose names were set

forth in a schedule to the petition, but none of them were served, the judgments not having been entered up before the passing of 27 & 28 Vict. c. 112 (July 29, 1864); nor had executions been registered.

Mr. Shapter and *Mr. Pool* for the petitioners.

Mr. Glasse and *Mr. Jervis* for Hart.

Mr. Ellis, for a judgment creditor, whose judgment was registered in the Common Pleas and in the Middlesex Registry in June 1866, but upon which no writ of execution had been issued, contended that he was entitled to appear upon the petition, and claimed his lien upon the fund in Court for the amount of his judgment debt and costs.

MALINS, V.C., regretted that any doubt could exist as to the intention of the Legislature in passing the 27 & 28 Vict. c. 112. The effect of that statute, as indicated by the preamble and the terms of the first section, was to repeal the enactment contained in 1 & 2 Vict. c. 110, s. 13. The mere entering up of a judgment no longer affected the debtor's land, until such land had actually been delivered in execution under the sheriff's writ. In the present case, therefore, the creditor had no right of lien, and was not entitled to appear upon the petition.

MALINS, V.C. } THE LANDED ESTATES CO. (LIMITED)
Feb. 13. } *v.* BAGGALLY.

Practice—Production—Affidavit of Document—Correctness of, how to be Contradicted.

This case came on by way of adjourned summons, upon the question of the sufficiency of an affidavit of documents made by the defendant in the cause.

The only material point was as to the evidence which could be appealed to for the purpose of showing that the defendant had in his possession or power other documents than those which he admitted in his affidavit.

Mr. Higgins, for the plaintiff, contended that he was entitled to refer to anything upon the record, and therefore to a deposition made by the defendant in the cause, which he insisted admitted the possession of further documents that the defendant had not scheduled in his affidavit.

Mr. Cotton, for the defendant, insisted that the plaintiff was only entitled to contradict the defendant's affidavit by his answer, and could refer to nothing else.

The VICE-CHANCELLOR said that the incorrectness of the affidavit might be shown by reference to any of the proceedings in the cause, and allowed the deposition to be read.

MALINS, V.C. } WRENCH *v.* WYNNE.
Dec. 12, Feb. 13. }

Practice—Stop Order by Summons—Consent of Assignor.

In this case a question arose as to the validity of a stop order which had been obtained by summons in His HONOUR'S chambers without the consent of the assignor or person to be affected thereby.

It appears that, by the existing practice, such orders have hitherto been obtained in Chambers only in cases where the assignor and assignee concur; it being the rule that, where the assignor does not concur, the application should be by petition in Court.—Vide Seton, p. 953; Morgan, Ch. Acts, p. 507. note *a*.

Mr. Glasse and *Mr. W. W. Karslake*, in support of the order, contended that the rule was not founded on any authority, and that the conduct of business in Chambers was left solely to the discretion of each judge.—15 & 16 Vict. c. 80, ss. 11, 13; vide Morgan, Ch. Acts, p. 144.

Mr. Cotton and *Mr. J. Bradford*, contra, referred to the cases cited in Morgan, and submitted that any variation in the prevailing practice would cause great inconvenience. That a stop order, adversely obtained, involved matter of title, and in case of dispute such matter should be exhibited on the record, or what corresponded to the record, of the Court.

Dec. 12.—MALINS, V.C. held that the granting of such an order upon summons in Chambers was properly within the discretion of the judge, and that it was unnecessary to apply by petition, since no right was decided and nobody was prejudiced, the order merely operating as a protection to the person who had a *prima facie* claim on the fund. His HONOUR thought the alleged practice was founded on a misapprehension of the authorities. The matter was again mentioned this day (Feb. 13), upon which His HONOUR intimated that, so far as he was concerned, the question was finally decided.

MALINS, V.C. } *Re* THE LONDON INDIA RUBBER COMPANY (LIMITED), *Ex parte* DODGE.
Feb. 13. }

Company—Winding-up—Contributory—Bankruptcy—Order and Disposition—Notice, Presumption of.

This matter came on upon cross-summonses, raising two conflicting claims to be settled on the list of contributories in the winding-up of this company, the shares in which had turned out to be of value.

By deed of August 15, 1860, the company in question entered into a conditional contract with Nathaniel Dodge that in certain events, which duly happened, 2,000 of their shares should become the property of N. Dodge. In December 1860 he assigned 1,140 of these shares to his son, George Dodge, for valuable consideration. No notice of the assignment was given by the son to the company. At the time of the winding-up the shares had not been allotted, nor was there any register of shareholders.

Twenty-one days after the assignment the father became bankrupt. In 1861 his assignees applied to the son, claiming 340 of the shares assigned to him, alleging now that they then understood that other parties claimed the remaining 800 shares. But in the winding up of this company they set up a claim to the 800 shares, on the ground that for want of notice to the company they passed to the father's assignees as being in his order and disposition with the consent of the true owner. The son, on the other hand, claimed them on the ground that under the circumstances of the case the company must, at any rate, be affected with implied notice of the assignment and the title of the son. It appeared that in 1861 the assignees, who were then represented by the same solicitors as now, wrote two letters to the son in application for the 340 shares, but making no claim to the remaining 800; and that upon the examination of the bankrupt in 1861, no question was put to him with reference to the 800 shares; while the present claim of the assignees was only set up after a lapse of more than eight years from the time of the father's bankruptcy.

Mr. Cole and *Mr. Chapman Barber* for the assignees.

Mr. Pearson and *Mr. Higgins* for the son.

Mr. Glasse and *Mr. Locock Webb* for the official liquidator.

The VICE-CHANCELLOR said that he must consider the

assignees as much alive to their duties in 1860 and 1861 as they were now, and their conduct then in making no claim to more than the 340 shares was in fact an admission that they had no claim to the 800. Considering the time that had elapsed before any claim was made by the assignees to the shares now in question, and the fact that the presumption was in favour of the assignee for value, His Honour must hold that the company were aware of the assignment to the son, and that he was therefore entitled to the 800 shares.

James, V.C. Feb. 10. } Ware *v.* Gardner.

*Voluntary Settlement—Trader—*13 *Eliz. c.* 5*—Intention to Delay Creditors.*

Suit to set aside a voluntary settlement executed in 1861 by R. Gardner, a builder in Exeter, whereby he settled not only all the property he then possessed, including his furniture and trade effects, but also all property he might subsequently acquire upon certain trusts, the first being for his wife's separate use for life. The wife, by her answer, now alleged that the settlement was made on the consideration of her husband having possessed himself of all her property, but this part of the defendant's case was abandoned at the bar. The evidence went to show that Gardner was in solvent circumstances at the time of executing the deed, and that he was in the habit of paying all his bills at once, and of keeping enough ready money in hand to meet all ordinary liabilities. Seven years after the execution of the settlement he fell into difficulties and became bankrupt. The deed was never registered under the Bills of Sale Act.

Mr. Druce and *Mr. W. Morris* for the plaintiffs.

Mr. Kay and *Mr. W. W. Karslake*, for the defendants, urged that the question was one of intention; no fraudulent intention was here proved or could be implied.

James, V.C. (without calling for a reply), said he could come to no other conclusion than that this deed was executed with an intention to defeat and delay creditors. He should declare the deed to be void, with the usual directions.

James, V.C. Feb. 10. } Slade *v.* Barlow.

Partition Suit—Adverse Legal Title—Sir J. Rolt's Act—Trial at Law—Statute of Limitations.

Partition suit instituted by the heirs-at-law of Alice Slade. Jeremiah How by will, dated January 1833, gave his son, S. J. How, all his copyhold estate at Hornsey, which he had surrendered to the use of his will, and he gave his residuary real estate to his three sons, Jeremiah How, Thomas How, and S. J. How, and his daughter Alice Slade, as tenants in common. The testator died in 1834, seized for an estate of inheritance to a piece of copyhold land at Hornsey, which had never been surrendered to the use of his will. Shortly afterwards S. J. How entered into possession of this piece of land. The defendant claimed as a purchaser under him.

Mr. Kay and *Mr. Charles Hall*, for the plaintiff, argued that notwithstanding the question of adverse legal title of the defendant, this Court would entertain the bill under Sir J. Rolt's Act, 25 & 26 Vict. c. 42, or at least would retain the bill for a year till plaintiffs had tried their action of ejectment at law following the recent case of *Bolton* v. *Bolton* unreported.

Mr. Joshua Williams and *Mr. Shebbeare*, for the defendant, were not called upon.

James, V.C., said he should follow the case cited.

Mr. Kay said there was this difficulty—the bill had been filed within the time allowed by the Statute of Limitations, but the time had now expired, and would be a bar to an action at law. He asked the Court to give a necessary direction to allow of their proceeding at law notwithstanding the statute. *Sutton* v. *Smith*, in the Weekly Notes of January 30, was referred to.

James, V.C., said he had no jurisdiction to make such an order.

Courts of Common Law.

Queen's Bench. Feb. 12. } Ellis *v.* M'Cormick.

Bankruptcy Act, 1861, *s.* 198*—Bankrupt—Assignment to Trustees—Certificate of Registration—Protection—Ca. sa.—Staying Proceedings—*30 & 31 *Vict. c.* 104, *s.* 3*—Majority of Creditors.*

Rule calling upon the plaintiff to show cause why the writ of *capias ad satisfaciendum* issued in this cause should not be set aside, and all proceedings to execute the same be stayed, unless the plaintiff obtained leave to execute the same from the Court of Bankruptcy, upon the ground that the defendant was protected from execution, by virtue of the certificate of registration of a deed dated September 30, 1864.

The cause of action accrued before the execution of the deed, which was registered on October 13, 1864, but the plaintiff was not mentioned as a creditor. A certificate of such registration was given in due course. The action was commenced on July 4, 1867, and was referred by judge's order under the provisions of the Common Law Procedure Act, 1852. The defendant pleaded, and appeared before the arbitrator, who made his award that 674*l.* 17*s.* 9*d.* was due to the plaintiff. On May 11, 1868, the plaintiff signed judgment for the debt and for the costs, which were taxed at 112*l.* 19*s.* A writ of *ca. sa.* was issued to the sheriff of the town and county of Kingston-upon-Hull, and a summons was taken out before Pigott, B. at Chambers to set it aside; but the learned Judge refused to do so, on the ground that the Court had no power to make such an order *quia timet.*

This rule was then obtained.

Quain and *R. G. Williams* showed cause upon affidavits, from which it appeared that the deed was not signed, or assented to in writing, by a majority in number, representing three-fourths in value of the

creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, as provided by the said Act. It further appeared the deed was one to which section 3 of 31 & 32 Vict. c. 104 would apply in this respect—that if the value of the securities held by the creditors on the debtor's property should alone be reckoned, the majority would have been sufficient. They contended that the Court had power to look at the deed, notwithstanding the certificate of the registration, and that the deed being invalid, the rule must be discharged.

W. G. Harrison, in support of the rule, contended that section 3 had a retrospective effect; that, although the deed was not executed by the required majority, as the law stood at the time of the execution, it must be taken to be so now, as section 3 would apply.

Per curiam (Mellor, J., and Hannen, J.).—It is clear that section 3 has not any retrospective effect. The deed is therefore invalid, and the rule must be discharged. It is probable also that it would have been discharged upon the ground that this is an application *quia timet*, but the plaintiff has not thought fit to object to the rule on that ground.

Rule discharged.

Queen's Bench. (Magistrate's Case.) Feb. 14. } Regina *v.* The Rhymney Railway Company.

Poor Rate—Occupation—Wharfage Dues—Rateable Value.

Special case, in which the question was raised whether the appellants were rateable in respect of wharfage rates paid for coal and other goods shipped and unshipped at the wharves occupied by the appellants. The wharves were occupied by the appellants under a demise from the trustees of the Marquis of Bute; the rates in question enhanced the value of the wharves, but they were received by the trustees on their own account, and not by the appellants, who therefore did not derive any benefit from them.

Field and *Philbrick* argued in support of the rate.

Bulwer, *H. G. Allen*, and *Thomas Allen* for the appellants.

Per curiam (Cockburn, C.J., Mellor, J., Hannen, J., and Hayes, J.)—Unless the appellants are rateable in respect of these rates the parish will lose the benefit of the enhanced value of the wharves. The trustees cannot be rated, because they are not the occupiers, and we are of opinion that parties cannot by an arrangement between themselves prevent the parish availing itself of the fact that the wharves are made more valuable by reason of these dues.

Rate affirmed.

Common Pleas. Feb. 11. } Taylor *v.* Dunbar.

Shipping—Insurance—Damage from Delay.

This was an action on a maritime insurance in the ordinary form, and the question was whether the insurer was liable for damage to goods which had been injured by delay in the voyage, the delay having been caused by tempestuous weather, but the damage having been solely caused by the delay.

Beasly for the plaintiff.

Sir G. Honyman for the defendant.

The Court held that the insurer was not liable.

Judgment for defendant.

Common Pleas. Feb. 11. } Spedding *v.* Nevell.

Damages—Renewal of Lease—Unauthorised Agent.

The plaintiff was a leaseholder under A. The defendant, professing to act as agent of A., contracted with the plaintiff for the renewal of the lease. The plaintiff then contracted with B. for the assignment of the rights given by the contract. On the determination of the lease A. refused to renew, on the ground that the defendant had no authority. The plaintiff brought a suit in equity for specific performance, in which A. swore he had given, and that the defendant had no authority. The suit thereupon ceased. B. then brought an action against the plaintiff, and recovered. The plaintiff now brought the present action to recover—(1) The costs in the Chancery suit; (2) The value the term would have been to him if it had been granted; (3) The costs and damages in B.'s action.

J. Brown (*Bush Cooper* with him) for the plaintiff.

Quain for the defendant.

The Court held the plaintiff entitled to the first and second heads of claim, but not the third, as the assignment to B. was not within the contemplation of the parties.

Judgment accordingly.

Common Pleas. Feb. 12. } Cox *v.* The Great Eastern Railway Company.

Railway Company—Cattle Plague Orders—Right to Charge for Cleansing Railway Truck.

The defendants carried the plaintiff's cow on their railway from Diss to Ipswich, and in addition to 5*s.* 8*d.*, their charge for the carriage, they claimed 1*s.* for cleansing the truck in which the cow was carried, every railway company being required by a cattle-plague order of August 26, 1867, to disinfect and cleanse every truck used for the carriage of animals once in every twenty-four hours. The plaintiff refusing to pay the 1*s.*, the cow was sold to pay the expenses, and the plaintiff sued the defendants in the County Court at Ipswich for such conversion, when the judge being of opinion that the defendants had no right to make the charge for cleansing, gave judgment for the plaintiff. The defendants now appealed therefrom.

Kemp for the appellants.

J. Brown appeared for the plaintiff, but was not called on.

The Court held that the judge of the County Court was right, as no service appeared to have been rendered to the plaintiff individually, and there was no right to charge the plaintiff for doing what the defendants were required to do for the benefit of the public generally.

Appeal dismissed.

Common Pleas. Magistrate's Case. Feb. 12. } Davis (Appellant), Scrace (Respondent).

Sunday Trading—Metropolitan Police Act, 2 & 3 *Vict. c.* 47, *s.* 42—*Refreshment for Travellers—Onus of Proof* —11 & 12 *Vict. c.* 43, *s.* 14.

This was an appeal from the decision of one of the

magistrates at the Clerkenwell Police Court, who had convicted the appellant (the landlord of a public-house at Stoke Newington) of having, contrary to the Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 42, opened such house for the sale of beer, &c. on a Sunday before the hour of one in the afternoon, otherwise than for refreshment for travellers. The only question was whether the burthen of proving that the case was not within the exception of 'refreshment for travellers' was cast on the informer, or whether the publican must show that the persons so supplied with refreshment were travellers. The magistrate decided that the publican must prove that the persons so supplied were travellers, and as he did not do so, he convicted him, and in support of such conviction reliance was placed on the proviso at the end of section 14 to 11 & 12 Vict. c. 43, which provides that if the information 'negative any exemption, exception,' &c., 'in the statute on which it shall be framed, it shall not be necessary for the prosecutor to prove such negative.'

Quain for the appellant.

M. White for the respondent.

The Court (Keating, J., Montague Smith, J., and Brett, J.) held that the case was governed by *Taylor* v. *Humphries*, 17 C. B. N. S. 539 (s.c.), 34 Law J. Rep. M. C. 1, and that the reservation in favour of travellers was not in truth an exception, so that the proviso to 11 & 12 Vict. c. 43, s. 14, did not apply, and the onus of proving that the persons supplied were not travellers was on the informer.

Appeal allowed.

Exchequer.
Nov. 13,
Jan. 27.
} Eastwood *v.* Avison.

Devise — Construction — Estate Tail by Implication — Failure of 'Issue'—Power of Appointment to Children —Ejectment.

At the trial the facts appeared to be as follows:—By will taking effect before the Wills Act, the testator, Samuel Eastwood, devised certain lands to two of his grandsons respectively, without words of limitation, and after these devises the will proceeded as follows: 'but the above property, if either of them die without issue, shall return to the Eastwood family; but if they live to have children, they shall have power to make a will of it to their children.' One of the grandsons, who had since died without children, assuming to be tenant in tail of the lands devised to him, executed a disentailing deed, and conveyed them away. The heir-at-law of the testator now sought to recover them. The verdict had been entered for the defendant, leave being reserved to the plaintiff. A rule had been accordingly obtained, against which (November 13)

Manisty and *Waddy* showed cause.

Field, Joshua Williams, and *Wills* in support.

Cur. ad. vult.

Jan. 27.—The Court gave judgment, holding that the words 'without issue' meant 'without children,' and not an indefinite failure of issue, and therefore that the grandson took a life estate only, and the rule must be made absolute.

Rule absolute.

Probate and Matrimonial Causes.

Probate.
Jan. 13.
Feb. 9.
} Sharpe and Sharpe *v.* Crispin.

Domicile — Consul — Domicile of Lunatic Son of full Age —Change of Domicile—Evidence.

This was an interesting cause, the question being whether George Crispin was, at the time of his death, which took place in a lunatic asylum at Stoke Newington, Middlesex, on Sept. 1, 1862, domiciled in Weland in Portugal. His parents, who were English, were at the date of his birth, January 1804, domiciled in Portugal. He was educated in England, and in 1823 or 1824 was taken back to Portugal by his father, who was then British Consul at Oporto. He was of weak intellect, and unable to assist his father in his office. He returned to England in 1826 or 1827; a year or two afterwards he was placed under medical control, and in 1858 he was found lunatic under commission. His father, John Crispin, retired from the consular service on a pension in 1843, returned to England, and lived at Richmond until his death in 1846. The cause was heard before Sir J. P. Wilde on Jan. 13, and judgment was reserved.

Dr. Spinks and *Dr. Tristram* for the plaintiff, and *Giffard* and *Inderwick* for the defendant.

Sir J. P. Wilde held that George Crispin had died domiciled in England, and that residence in a foreign country as a public officer gave rise to no inference of a domicile in that country; but that, if already there domiciled and resident, the acceptance of an office in the public service of another country did nothing to destroy the domicile. With respect to the domicile of a lunatic son who continued lunatic after full age, he held that, as in the case of minority, the domicile followed that of the father. In regard to the mode in which an intention may be shown to abandon the domicile of origin and acquire a new one, he pointed out that it must vary indefinitely with the age, character, circumstances, and general conduct of the individual; and he held that the deceased, looking at the whole history of his life, had sufficiently shown an intention to abandon his domicile of origin and to acquire an English one, by the reluctance with which he accompanied his father back to Portugal, by expressions of dislike to residence in Portugal, and by his prompt return to England the moment that circumstances allowed it.

High Court of Admiralty.

Admiralty Court. Feb. 9. } The Bella Donna.

Damage—Difference of Opinion between Trinity Masters.

This was a cause of damage, in which the owners of the brig Azalea sought to recover from the owners of the brig Bella Donna the amount of the damage done to their vessel in a collision with the Bella Donna.

The case was remarkable from the fact that it led to the very unusual result of a difference in opinion between the gentlemen who assist the Court with their advice in nautical questions.

Milward and *E. C. Clarkson* appeared for the Azalea.

Butt and *Joseph Sharpe* were for the Bella Donna.

About 4 P.M. on December 6, 1867, the wind at the time being a gale from the N.E., the Bella Donna, a light brig of 216 tons, brought up with two anchors in Lowestoft Roads. An hour afterwards the Azalea, another brig of 218 tons, also in ballast, brought up to the southward and westward of the Bella Donna, at a distance somewhere between two or three cables' length and three-quarters of a mile from her. At 8.30 A.M. of the next day, the gale continuing, the starboard and then the port chain of the Bella Donna parted, the former somewhere near the anchor. Her foretopmast-staysail was immediately hoisted, her foreyards hauled, and her mainyard shivered; but this manœuvre did not get her into command, and, although her head fell off to S.W., she was checked by the chain over her bows, and, gathering way, her head came up, and she struck the Azalea on the starboard bow.

The defendants contended that the collision was an inevitable accident. The plaintiffs argued that if the staysail had not been set until the Bella Donna had driven astern of the Azalea no collision would have occurred. The main question was whether the manœuvre executed by the Bella Donna was one which would have been adopted by a seaman of skill and presence of mind. The Elder Brethren who assisted the Court differed in opinion, and therefore it was proposed that the evidence should be printed, and a third Elder Brother of the Trinity called in, and the case should be re-argued before the Court and three assessors.

The cause was now re-argued before the Court and three of the Elder Brethren, and at the close of the arguments the Court said that the Elder Brethren were agreed that the manœuvre executed by the Bella Donna, though unsuccessful, was a skilful one, and the only one under the circumstances calculated to enable the Bella Donna to avoid the collision. But the assessors were still divided in opinion as to the effect of the chain over her bows, one of them being of opinion that the master of the Bella Donna ought to have been aware that the chain was dragging, and that it would have some effect upon the movements of the vessel; the other assessors considered that it was impossible for the master to have been aware of the quantity of chain and its effect upon the vessel in time to adopt a remedy. The majority of the Court held that the collision was the result of inevitable accident, and that the Bella Donna was not to blame. Both parties will therefore pay their own costs.

Ecclesiastical Case.

Arches Court. Feb. 3. } Rippin and Wilson *v.* Bastin, Dalton, and Gorse.

Subtraction of Church Rates—Letters of Request—Practice.

The plaintiffs desired to institute a suit against the defendants for subtraction of church rates. With that view they obtained from the Vicar General and official principal of the Episcopal Court of Lincoln letters of request directed to the Dean of Arches, requesting him to cite the defendants before him to hear the cause; and

Dr. Middleton moved the Court accordingly.

Sir R. J. Phillimore.—The letters of request do not state the date on which the rate was made, or the circumstances which take the rate out of the operation of the Compulsory Church-rate Abolition Act. I shall require you either to bring in fresh letters of request, or to file an affidavit as to those particulars. If the affidavit is satisfactory, I will then sign the letters of request without further motion. For the future I shall require that in every case my acceptance of letters of request shall be moved for by counsel.

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Present Selwyn, L.J., Giffard, L.J., Sir J. W. Colville, and Sir Laurence Peel.

Practice—Appeal—Assignee—Joinder of.

This was a petition for leave to add the names of the assignees in bankruptcy of certain respondents, in addition to the names of the other respondents.

The petitioner stated that on April 18, 1867, the petitioner was and for some time previously had been carrying on the business of a merchant in copartnership with Charles Frederic Still and George Francis Maclean at Victoria, in the colony of Hongkong, under the style or firm of George Lyall and C. F. Still.

That on April 18, 1867, the petitioner was duly adjudicated bankrupt by the Court of Bankruptcy in London, and having surrendered to such bankruptcy, did, on January 14, 1868, pass his last examination thereunder. That on May 23, 1867, the petitioner and the said Charles Frederic Still and George Francis Maclean were, on the petition of certain of their creditors filed on May 21, 1867, adjudicated bankrupts by the Supreme Court at Hongkong. That the said Charles Frederic Still and George Francis Maclean being, at the date of such adjudication, in Hongkong, and having had due notice thereof, surrendered thereto and passed their last examination, and respectively obtained their orders of discharge thereunder. That the petitioner, at the time of such adjudication, was residing in England, and had no notice of such adjudication, and was thereby rendered unable to show cause against the validity of the same within the time limited by and pursuant to the provisions of the bankruptcy ordinance of the colony. That the petitioner was still subject to the jurisdiction of the Court

of Bankruptcy of London. That the petitioner, on June 19, 1868, obtained leave to appeal to Her Majesty in Council, for the purpose of disputing the validity of the adjudication in Hongkong of May 23, 1867, and of having the same annulled.

The petition then alleged that it was necessary for the hearing of the said appeal that the assignees acting in the said proceeding in bankruptcy in the Supreme Court of Hongkong should be made parties in the said appeal, in addition to the other respondents.

The petitioner then prayed that the assignees appointed under the bankruptcy in Hongkong might be added to the names of the other respondents.

Mr. Lord appeared in support of the petition.

Selwyn, L.J.—Their Lordships will give the petitioner leave to add the names of the assignees in the bankruptcy in Hongkong, in addition to the names of the other respondents, without prejudice to a subsequent application to change the names of the assignees if it should appear that the bankrupt's estate is vested in other persons.

Petition granted.

Courts of Equity.

Lord Hatherley, L.C.
Feb. 15, 16, 17, 18.

Hope Mutual Life Assurance and Honesty Guarantee Society *v.* Edwards.

Fraud—Assignee of Judgment obtained by Fraud—Equities.

In 1855 the assets and liabilities of the Hope, &c., Society, were transferred to the Mitre Life Insurance Company, including among other liabilities an insurance for 1,000*l.*, effected by one Galles on his life in the same year. Galles in November 1855, went to sea, and was never afterwards heard of. In May 1857, his personal representative, Schlappfer, sued the Hope Society on the policy. The Mitre Company defended the action, and its manager, Stronsberg, compromised it on the terms of letting judgment be signed by default against the Hope Society for the debt and costs. It appeared that Stronsberg had himself purchased Schlappfer's interest in the action, and he assigned the judgment and policy to one Bowes, as trustee for the defendant Edwards. The Mitre Company in the meantime went into liquidation. In February 1863, Bowes, execution having been previously issued on the judgment and *nulla bona* returned, presented a petition for winding-up the Hope Society. The Society opposed it on the ground that the judgment, on which the petition was based, had been obtained by fraud. A winding-up order was made by the Master of the Rolls, but reversed by the Lords Justices; and on appeal the House of Lords ordered the petition to stand over on an undertaking by the Society to impeach the judgment. The present suit had been instituted for that purpose against Edwards, Bowes, and the official manager of the Mitre Company. The Master of the Rolls dismissed the plaintiff's bill with costs, being of opinion the Society had not established a case of fraud. The society appealed.

Mr. Jessel and *Mr. Hemming* appeared for the appellants.

Mr. Southgate, Mr. Cracknell and *Mr. G. O. Edwards* for the defendants Edwards and Bowes.

Mr. Kekewich appeared for the official manager of the Mitre Company.

The Lord Chancellor said (Feb. 18) there was now evidence which had not been before the House of Lords in *Bowes* v. *The Hope Assurance Society*. It was clear that the action had been defended by the Mitre Company through Stronsberg, and that the Hope Company had never interfered, probably considering that the Mitre Society was only acting in accordance with the provisions of the deed of sale. It seems likely that all parties had been deceived by Stronsberg; and though Mr. Edwards had no notice, and though no case of fraud was set up against him, he must take the judgment with its equities. An injunction must consequently be granted to restrain all proceedings on the judgment. The defendants Edwards and Bowes must pay the plaintiffs their costs of the suit, but there would be no costs of the appeal.

Lords Justices.
Feb. 17.

Carrick *v.* Ford.

Fraudulent Deed as against Creditors—Wife's Debts before Marriage.

This was an appeal from the Master of the Rolls. The bill was filed by the official assignee in a bankruptcy against the trustee of a deed executed under the circumstances presently stated, and Mrs. Barnard, the wife of the bankrupt. The deed was a settlement executed by Mr. Barnard of an annuity to which his wife had become entitled since the marriage. It appeared that at the date of the marriage Mrs. Barnard was largely indebted to several creditors, who, after the marriage, had proved under the bankruptcy of her husband as his creditors. No dividend had been declared in the bankruptcy. Mrs. Barnard by her answer claimed that, even if the deed should not be supported in its entirety as a good settlement, still she had an equity to a settlement out of it.

The question argued was whether or not she had any valid claim upon the property, either under the settle-

ment, or by virtue of any equity to a settlement. The Master of the Rolls had by his decree declared that the deed should be set aside, and the annuity should belong to the plaintiff for the benefit of the creditors.

Sir R. Baggallay and *Mr. H. Smith* for the appellant, Mr. Barnard.

Mr. Jessel and *Mr. W. W. Karslake* for the plaintiff, the respondent.

Their Lordships held that as against the creditors, who were originally the wife's creditors, the deed could not be supported.

Lords Justices. Feb. 19. } Martin *v.* Powning.

Jurisdiction in Equity—Deed Registered under Bankruptcy Act—Plea.

This was an appeal from the decision of Stuart, V.C., overruling two pleas put in by the defendants to the bill.

The question was whether this Court would undertake the administration of the trusts of a deed which had been duly registered under section 192 of the Bankruptcy Act. The bill was filed by Mr. Martin, on behalf of himself and all other the creditors of one John Parkin, against the trustees of the deed, and against certain persons who had guaranteed the payment of the instalments covenanted to be paid by the deed. The deed alleged some acts of misconduct on the part of the defendants, and prayed for accounts. Pleas were put in instead of demurrers, because there was an inaccuracy in the bill as to the date of registration of the deed, by which it would appear, contrary to the fact, not to have been duly registered. The Vice-Chancellor thought that the Court had concurrent jurisdiction, and although in general cases it ought not to exercise it, yet that there were special circumstances in the present case, arising from the alleged acts, which in the eye of this Court were fraudulent, and which induced him to overrule the pleas.

Mr. Hinde Palmer and *Mr. Ince* for one defendant.

Mr. Green and *Mr. Ince* for the other defendants.

Mr. Wickens and *Mr. R. Roberts* for the plaintiff.

Their Lordships held that the pleas were good, and reversed the decision of the Vice-Chancellor.

Lords Justices. Feb. 19. } *Ex parte* Barnett, *In re* Taylor.

Bankruptcy—Appeal from Registrar.

The question which alone was argued in this case was whether the Court of Appeal would hear an appeal from an order made by the registrar of the Bankruptcy Court acting as registrar, and not as representing the commissioner under section 27 of the Bankrupt Law Consolidation Act, 1849.

Mr. Everitt for the appellant.

Mr. Bardswell, for the respondent, was not called upon.

Their Lordships held that if an improper order be made by the registrar, the proper course was to apply to the commissioner to discharge it, and not to come to this Court. They therefore dismissed the appeal.

Lord Romilly, M.R. Jan. 22, Feb. 10. } Davies *v.* Sear.

Way of Necessity—Injunction.

In March 1867 the defendant purchased the lease of a piece of ground with a house, partly erected, though not completed, upon it. Under the first floor there was an archway over a road leading to a plot of ground beyond, intended for mews. In the assignment to the defendant, no right of way over this road to the mews was reserved, and there were at that time other means of access to the mews. The defendant, however, knew, when he took the assignment, that his own house was erected according to plans which included the adjoining property for building in such a way as to cut off all access to the mews except by the road under the archway, and he saw the works proceeding in conformity with these plans. After these works were completed, he attempted to build up this road, and this bill was filed to restrain him from doing so.

Mr. Graham Hastings was for the plaintiff.

Mr. Southgate and *Mr. Wickens* for the defendant.

Feb. 10.—The Master of the Rolls granted a perpetual injunction, on the ground that the road in question was a way of necessity, and that its necessity was apparent, the defendant being put on inquiry as to the mode in which the buildings were to be erected.

Lord Romilly, M.R. Feb. 18, 19. } The Madrid Bank (Limited) *v.* Pelly.

Company—Secret Payment to Directors—Liability to Refund.

In the case of *The Madrid Bank* (*Limited*) *ex parte Williams* (35 Law J. Rep. Chanc. 474, where the facts are fully set out), the Master of the Rolls refused to allow Mr. Williams, on behalf of the promoters, to stand as a creditor of the company for 3,000*l.*, the unpaid portion of a sum of 10,000*l.* payable under the articles of association as promotion money. The circumstance on which this decision was mainly grounded was, that under an alleged secret agreement, 500*l.* each had been paid to four of the directors out of this promotion money. The present bill was filed against the directors to recover the 7,000*l.* actually paid. The Master of the Rolls, at an early stage of the argument, intimated that he would not hold the directors liable for the part of the 7,000*l.* which had been paid to and retained by the promoters. Thus, the contest was whether certain of the directors should be compelled to refund the 500*l.* each which they had received, and which they contended was paid to them not in pursuance of a secret agreement, but as a gratuitous act of bounty.

Mr. Roxburgh and *Mr. Edmund James* for the Madrid Bank.

Sir R. Baggallay, *Mr. Southgate*, *Mr. J. N. Higgins*, *Mr. Eddis*, and *Mr. Renshaw* for different directors.

Feb. 19.—The Master of the Rolls held that, whether these sums of 500*l.* each had been paid in pursuance of a binding contract or were a mere gratuity to the directors, the payment could not be upheld against the shareholders, and ordered each defendant who had received the sum to repay it. The bill was dismissed with costs against those directors who had not received any money.

Lord Romilly, M.R. } *Re* The Estates Investment
Feb. 20. } Company. Paull's Case.

Company—Misrepresentation—Contract to Take Shares—Contributory.

Paull took shares in the above company on the faith of representations in a prospectus which have been decided to have been false and fraudulent (*Ross Estates Investment Company*, 37 Law J. Rep. (N.S.) Chanc. 873). On his discovering this to be the fact, he repudiated his contract, and applied to the company to rescind it, and remove his name from the register of shareholders. The company, however, refused to do so, and brought an action against him for allotment money. A number of other persons were in the same position as himself; and one of them, Ross, by arrangement with the others, instituted a suit to set aside his contract to take shares, and have his name removed from the register of shareholders. It was intended that Ross's case should settle that of the others; the actions at law were stayed, and the company undertook that Paull and the others should not be prejudiced by not taking proceedings in equity, and waiting till Ross's case was decided. A decree was ultimately made in Ross's favour, but not till after the company had been ordered to be wound up on the petition of their secretary. This was a summons to place Paull's name on the list of contributories.

Mr. Southgate and *Mr. Higgins*, for the official liquidator, contended that, as Paul had not taken any actual steps to avoid the contract before the winding up, he ought to be on the list of contributories.

Mr. Jessel, *Mr. Swanston*, and *Mr. Everitt*, for Paull, were not called on; and

The Master of the Rolls said that it was quite proper, under the circumstances, for Paull not to take separate proceedings in equity, but to await the result of those taken by Ross, and he ought not to be made a contributory.

Lord Romilly, M.R. } Bevan *v.* Bevan.
Feb. 22. }

Tenant for Life—Income and Capital.

A testator had directed his property to be realised and the income to be paid to his wife for life. A portion of his property consisted of a mortgage debt of 3,000*l.* secured on a reversion, which could not be realised at once, nor was interest paid on it; at the death of the testator there was due for interest 600*l.*, before the mortgage debt could be realised by the falling in of the reversion a further sum of 2,300*l.* accrued due for interest. The case now came on to determine how much was to be paid the tenant for life in respect of her having gone without income in the meanwhile as far as this part of the testator's property was concerned, and how much was to be considered as capital belonging to the estate. It was fourteen years since the testator had died.

Mr. Jessel and *Mr. Archibald Smith*, for the tenant for life, contended that a calculation should be made what sum and compound interest, invested at 4 per cent. one year after the death of the testator, would now produce 5,900*l.* This was to be treated as capital, and the balance paid to the tenant for life in respect of the income she had forborne.

Mr. Baggallay and *Mr. Macnaughten*, on the other hand, said the estate was entitled to the same sum it would have had if the mortgage debt could have been realised at the death of the testator, namely, 3,600*l.*, which was about 400*l.* more than it would get by the method the tenant for life suggested.

The Master of the Rolls decided that the tenant for life was entitled to what she asked for.

Stuart, V.C. } Milns *v.* Pickstone.
Feb. 23. }

Partnership—Agreement to Dissolve—Stipulation as to Acceptance of a Lease—Bill to Enforce the Stipulation only—Specific Performance.

In June 1862 the plaintiffs and the defendant Pickstone were in partnership together, at Manchester, as cotton spinners and manufacturers. The partnership property then consisted of (*inter alia*) leasehold property granted to the partners by Lord Derby, and vested in them, as such, for a term of 999 years, from October 8, 1855. On June 6, 1862, an agreement was entered into by the partners for a dissolution of the partnership; and that agreement contained eight clauses to the following effect: (1) as to the dissolution itself; (2) as to certain wool to be taken by the defendant; (3) as to the payment of a loan of 14,265*l.* 1*s.* 8*d.* and other moneys to the defendant in respect of his then interest in the concern; (4) and (5) a reference of several matters of account to arbitration; and (6) as follows:—'That the plaintiffs should, at the cost of the defendant Pickstone, grant a lease to him of certain buildings and premises occupied by him at Stand, part of the partnership property, on the terms of a draft lease signed by the said parties hereto.' (7) Provided that the plaintiffs should give up possession of the premises, not later than September 29, 1862; and (8) for mutual releases. The draft lease contained a stipulation that a sufficient supply of water for all purposes for which the said premises might be used in accordance with the covenants thereinafter contained should be supplied by the lessors (the plaintiffs) from their reservoirs, of which a quantity not exceeding 10,000 gallons per day was to be supplied from their top reservoir. The rent reserved by the draft lease was 200*l.* per annum; and the lease was so made as to be determinable by the defendant at the end of 3, 7, 14, or 21 years, on six months' notice. The defendant entered into the possession of the premises on the footing of the aforesaid agreement; and in 1863 the arbitrator made his award, under which the defendant paid the plaintiffs a sum of 1,400*l.* In November 1866 a further reference of other matters then still pending between the parties was agreed upon; but no award had yet been made under that submission.

The defendant had not executed, and refused to execute when tendered to him by the plaintiffs, a lease of the premises of which he was in possession; on the ground principally, as he alleged, that the plaintiffs could not supply him with the water as stipulated, without which the premises would be perfectly useless to him. Upon that, the plaintiffs filed their bill in this suit, to compel the defendant 'to perform the sixth article of June 5, 1862, and to accept a lease of the premises therein mentioned, at the rent, for the term of years, and on the terms generally, of the draft lease so signed by the parties to the said agreement.'

Mr. Dickinson and *Mr. Bedwell* appeared for the plaintiffs.

Mr. Greene and *Mr. H. B. Ince*, for the defendant, insisted—(*a*) That the plaintiffs could not compel him to perform a part only of the agreement. (*b*) That even if they could, they could not give him all that he was entitled to under the lease; viz., the supply of water. (*c*) That several of the matters in dispute between the parties were still undisposed of by the arbitrators; and (*d*) That time was a complete bar to the plaintiff's bill.

Stuart, V.C., was of opinion that the lease and the agreement were both clear and distinct in their terms; that the evidence in the suit did not show that the plaintiffs had in any respect failed to perform their part of it; that the evidence did show that, although the water might not be supplied from the particular source mentioned, it could be, and in much larger quantities, from others; that the defendant, who had originally been a copartner with the plaintiffs in this very property, must have known all its requirements and capabilities; that he had received the 14,265*l.* 1*s.* 8*d.* under the agreement of June 1852; that the filing of the bill in this suit was a complete and valid revocation by the plaintiffs of the matters submitted to arbitration; that time did not bar the plaintiffs; and that the defendant must execute the lease and pay the costs of the suit.

Stuart, V.C.
Dec. 7, 9, 1868,
Feb. 11, 1869. } Holland *v.* Holland.

Trustee—Acceptance under Hand and Seal—Breach of Trust—Specialty Debtor.

The question argued upon this adjourned summons was, whether the *cestuis que* trust of a trustee who, by deed duly executed, accepted the trusts of a will and afterwards committed a breach of trust, were entitled to be considered as specialty creditors in the administration of his assets. By an indenture dated December 10, 1859, Frederick Cooke was appointed a trustee of the will of Henry Clarke, jointly with one Claypon, and Cooke 'did thereby testify and declare his acceptance of the said trusteeship.' This indenture was duly executed by Cooke, who survived his co-trustee, committed a breach of trust by improperly retaining in his hands moneys arising from the sale of property of the testator, and died insolvent. A suit for the administration of the estate of the testator Clarke having been commenced, new trustees of the will were appointed, who carried in a claim as specialty creditors in another suit which had been instituted to administer the estate of Cooke.

Mr. Dickinson and *Mr. Horace Davey* for the claimants.

Mr. C. Hall and *Mr. Speed* for the simple contract creditors of Cooke.

Mr. Dickinson in reply.

Stuart, V.C., stated his strong impression that in the case of a declaration of trust under the seal of the trustee the *cestuis que* trust were specialty creditors; but, in deference to a recent decision of Lord Cairns in *Isaacson* v. *Harwood*, Law J. Rep., 8 Chanc. Ap. 225, reserved his final judgment.

Feb. 11.—Stuart, V.C., now showed, in an elaborate review of all the authorities, that, except in *Wynch* v. *Grant*, 2 Drew, before V.C. Kindersley, and *Isaacson* v. *Harwood*, 37 Law J. Rep. (N.S.) Chanc. 209; s.c. Law Rep. Chanc. 225, before Lord Cairns, in all the cases where the Court had refused to allow a claim against the assets of a trustee for a breach of trust to be a specialty debt, the trust had been created by will, and the trustee had executed no deed under his hand and seal which bound him to the performance of the trusts. And His Honour came to the conclusion that, both upon principle and upon the authority of Lord Talbot, Sir Joseph Jekyll, Sir John Trevor, Lord Eldon, Sir Lancelot Shadwell, and V.C. Knight-Bruce, he was bound to hold that, where a trustee had executed such a deed, his *cestuis que* trust were entitled to rank as specialty creditors.

Malins, V.C.
Jan. 12, 13, 14.
Feb. 17. } Gray *v.* Lewis.

Company—Directors—Agreement ultra vires—Purchase of a Company's Shares with their own Funds—Breach of Trust.

This was a bill filed by the plaintiff on behalf of himself and all other shareholders (except the defendants) in Laffitte & Co., Limited, against the directors of the company and others, impeaching certain transactions in connection with the establishment of the company in December 1865. The main object of the company was to purchase the banking business of Mr. Charles Laffitte in Paris, the sale of that business being subject to the condition that 40,000 shares should be subscribed for in London; the whole capital of the new company was to be 3,000,000*l.* divided into 150,000 shares of 20*l.* each, 1*l.* payable on application, and 4*l.* on allotment. The 40,000 shares were taken up by the International Contract Company, partly in behalf of the Ottoman Financial Association as their nominees, and partly for their own benefit. Neither the International Contract Company nor the Ottoman Financial Association were at that time in a position to advance the money payable in respect of the shares.

An arrangement was thereupon entered into on December 8, 1865 (the day of registration of the new company), whereby the National Bank undertook to discount the promissory notes of the International Contract Company to the amount of 200,000*l.*, the directors of Laffitte & Co. (two of whom were also directors of the National Bank) at the same time undertaking that 'until the amount of such notes should be replaced to the National Bank there should stand to the credit of Laffitte & Co., Limited, an amount equal to the sum remaining unpaid on the said notes.'

The prospectus was then issued, concealing the nature of the above transaction, and stating that the requisite number of shares had been taken up. Upon the faith of the representation contained in the prospectus the plaintiff took 200 shares in the company.

It appeared that none of the promissory notes of the International Contract Company were paid at maturity; but were, in fact, paid by the National Bank out of moneys standing to the credit of Laffitte & Co. A further sum of 30,000*l.* was subsequently advanced by the National Bank under a similar arrangement with the directors of Laffitte & Co. An order for winding-up the company was made on November 3, 1866, shortly after which the present bill was filed.

Mr. Huddleston, *Mr. Cotton*, and *Mr. Fischer* for the plaintiff.

Mr. Jessel and *Mr. Lindley* for the National Bank.

Sir R. Palmer, *Mr. Druce*, and *Mr. Wickens* for

Messrs. Lewis and Henshaw, directors of the National Bank and of Laffitte & Co.

Mr. E. K. Karslake, Mr. W. Pearson, Mr. Jackson, Mr. V. Hawkins, Mr. Bowring, Mr. Roxburgh, Mr. Caldecott, Mr. Glasse, and *Mr. Robinson* for other defendants.

Mr. J. Pearson and *Mr. Waller* for the official liquidator.

Malins, V.C., held that the transaction was illegal, being in effect a purchase by Laffitte & Co., Limited, of their own shares, and a breach of trust on the part of the directors, that their agreement with the National Bank, upon the faith of which the money was advanced, was *ultra vires*; that the bank could acquire no rights thereunder, and must therefore recoup the sums paid upon the promissory notes. His Honour characterised the whole proceeding as 'false, fictitious, and fraudulent.'

Malins, V.C. } *Re* General Provident Assurance
Feb. 20. } Company (Limited).

Company—Winding-up—Equitable Mortgagee, Claim by, Disallowed—30 & 31 Vict. c. 131, s. 37.

Adjourned summons. In January 1868, shortly before the winding-up of the above company, Messrs. Brandon advanced 150*l.* to the official manager, upon the deposit of certain deeds, and a memorandum of mortgage signed by him, but without requiring any of the special formalities prescribed by the articles of the company and the Companies Act, 1862, for effecting a valid mortgage. No record of the transaction was entered in the books of the company. In the winding-up the Chief Clerk disallowed the claim.

Mr. A. E. Miller, in support of the summons, contended that the equitable right of the mortgagees could not be defeated by the mere absence of the formalities required to create a legal mortgage; moreover, that the contract was binding upon the company under the provisions of 30 & 31 Vict. c. 131, s. 37, having been entered into with 'a person acting under the implied authority of the company.'

Mr. Napier Higgins, for the official liquidator, resisted the claim.

Malins, V.C., held that the company was not bound, and disallowed the claim, with costs, but without prejudice to any lien that Messrs. Brandon might establish upon the deeds in their hands.

Malins, V.C. } Ozanne *v.* Kennedy.
Feb. 20. }

Will—Maintenance and Education of Infant Children—Amount Restricted by Will

This was a summons (adjourned from Chambers) on behalf of the three infant children of Lord Nigel Kennedy, to have a sufficient sum applied for their maintenance and education out of the income of certain trust funds to which they would become entitled on attaining their majority, under the will of their grandmother, Catherine May.

The testatrix directed the trustees to apply so much of the income of the prospective share of each child as they should think fit ('not exceeding, during the lifetime of their father, the sum of 400*l.* in each year') towards the maintenance and education of such child. Their father was still living, but it was contended that the above sum was insufficient for properly maintaining the children according to their station, and the Court was asked to sanction some further allowance out of the surplus income of the trust fund, the accumulations of which were very large.

Mr. Glasse and *Mr. Waller* for the summons.

Mr. Shapter and *Mr. Burgett*, for remaindermen entitled, in the event of the children dying under age, to the accumulation as well as the capital, resisted the application.

Mr. E. K. Karslake and *Mr. Whitehead* for the trustees.

Malins, V.C. held that inasmuch as the testatrix had expressly restricted the sum to be applied for maintenance, the Court could not go beyond the terms of the will or make any further allowance.

James, V.C. } Bruckenden *v.* Williams.
Feb. 12. }

General Power of Appointment—Appointment making Fund part of General Personal Estate—Destination of Undisposed-of Residue.

By an indenture dated May 19, 1823, and by another indenture dated Nov. 13, 1852, certain property was vested in trustees in trust for such persons as Eleanora Davies should by deed or will appoint; and in default of appointment (in the events which happened), in trust for her next of kin.

Eleanora Davies made her will, and thereby, in pursuance of all powers enabling her in that behalf, devised and bequeathed all property, real and personal, over which she had any disposing power, to her executors thereinafter named, their heirs, executors, administrators, and assigns upon trust. As to 'my personal property,' after payment of debts, the testatrix directed her executors to make certain payments thereout, but did not dispose of the residue. The residue of the settled personalty was now claimed by Mrs. Davies's next of kin on the one hand, and on the other by the representative of her husband, who survived her.

Mr. Everitt for the plaintiff.

Mr. Druce and *Mr. Freeling* for the representative of the husband.

Mr. Hardy, Mr. Higgins, Mr. Bevir, and *Mr. Gardiner* for the next of kin.

James, V.C., held that the testatrix had appointed the fund in such a way as to show an intention to make it part of her general personal estate, and that, accordingly, the undisposed-of residue belonged to the husband's estate.

James, V.C. } Salisbury *v.* Metropolitan Railway
Feb. 19. } Company.

Public Company—Payment of Dividends out of Capital—Injunction.

By Acts passed in 1864 the Metropolitan Railway Company were authorised to make two extensions of their undertaking, called respectively the Notting Hill and Brompton Extension, and the Tower Hill Extension. These extensions were, in fact, treated as to capital as one undertaking, and this was legalised *ab initio* by the Metropolitan Railway Act 1868, and accordingly the capital and shares of either extension are known as extension capital or extension shares.

The Extension Acts authorised the creation of exten-

sion capital by shares to the amount in all of 1,900,000*l.*, and the borrowing on the credit of the extensions of 633,000*l.*; and, accordingly, by resolution passed on February 8, 1865, 19,000 10*l.* extension shares were created to carry, after December 31, 1866, the same dividend as the original ordinary shares, but so that for the first three years no such dividend should exceed 6 per cent. per annum.

Soon after these resolutions were passed the directors agreed with Messrs. Kelk & Co. for the construction of the Tower Hill or Eastern Extension. The agreement provided that the extension should be completed by December 31, 1867, and that in order to secure punctual completion, the contractors should, until the railway should be completed and open for traffic, pay to the directors such sums of money as should be equivalent to interest upon so much of the sum of 700,000*l.* (the share capital created in respect of this extension) as should from time to time be called up and paid, at the rate of 5*l.* per cent. per annum, until December 31, 1866, and thereafter at the rate of 6 per cent.; but if, in the opinion of the company's engineer, there should be any such delay as should render it impracticable to complete the railway in the time appointed, such allowance, in respect of interest, was to be made to the contractors as should be equivalent to the interest payable by the contractors for the period of the delay so occasioned.

In January 1868 a suit was instituted by a shareholder for the purpose of restraining the directors from charging certain payments to capital, and an interlocutory injunction was granted. The suit was not brought to a hearing, and in the Session of 1868 an Act was promoted by the directors for the purpose, amongst others, of putting an end to this litigation. The Act passed as the Metropolitan Railway Act 1868, and after a preamble in which it was recited that the progress and completion of the undertaking might be delayed, and the company greatly embarrassed, and the interest of the shareholders endangered if the litigation continued or were revived, and that it was therefore expedient that such provision as in the Act is expressed should be made with reference to the charge and application of the share capital, it was enacted that all moneys paid by the contractors by way of penalty or otherwise for the non-completion of the extension, or arising under their contracts or engagements, should be carried to the revenue account of the extensions and be applicable for the payment of dividends. The Act of 1868, as well as all other Acts relating to the financial arrangements of the company, provided that no dividend should be paid out of capital or money borrowed.

In January 1869 Messrs. Kelk & Co. under their contract paid to the directors 42,600*l.* for delay in completing the Eastern Extension, and the directors admitting that such delay was attributable to them, had repaid, or were about to repay this sum to Messrs. Kelk & Co. This sum of 42,600*l.* the directors intended to apply in payment of dividend on the extension stock.

It was not disputed that the repayment of the 42,600*l.* to Messrs. Kelk & Co. would be borne by the capital.

The plaintiff, who was a holder of 200 original shares purchased on Dec. 23, 1868, sued on behalf of all the shareholders except those who were defendants, and sought to restrain the application of the 42,600*l.* to the payment of dividends.

Mr. Amphlett, *Mr. Kay*, and *Mr. B. B. Rogers*, for the motion, contended that the payment of the 42,600*l.* by Messrs. Kelk & Co. was a mere device for evading the prohibitions against paying dividends out of capital, and was not legalised by the Act of 1868.

Sir R. Palmer, *Mr. Druce*, and *Mr. Bristowe*, for the defendants, opposed the motion.

James, V.C., was of opinion that the payment of the 42,600*l.* by the contractors was a mere sham payment, and that there was no part of this sum of which it could be truly predicated that it was money 'paid by the contractors for the non-completion of the extensions, or otherwise arising under their contracts or engagements;' therefore the Act of 1868 had no application, and there must be an injunction restricting the payment of any dividend out of the 42,600*l.* or any other moneys the directors shall have received or shall receive from Messrs. Kelk & Co. under the provisions of their contract, and which have been repaid or are to be repaid to Messrs. Kelk & Co. by the company.

Courts of Common Law.

Queen's Bench. Feb. 11. } Lawless *v.* The Anglo-Egyptian Cotton and Oil Company (Lim.)

Libel—Privileged Communication—Letter Printed by Directors of Joint-Stock Company and Sent to Absent Shareholders—Report of Auditors—Evidence of Express Malice.

This was an action of libel against the defendants, who were a limited liability company established for the purpose of growing cotton in Egypt. The plaintiff was their manager in Egypt, and it was part of his duty to send over to this country an account of his transactions to enable the directors to prepare an account of the profits of the undertaking and to furnish it to their shareholders. The libel complained of was a letter addressed to the shareholders, calling their attention to the report of the directors at their annual meeting, the balance sheet, and the report of the auditors. This letter contained these words, 'We certify that the accounts as above stated are correct. The shareholders will observe that there is a charge of 1,306*l.* 1*s.* 7*d.* for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly.' The letter was

printed by the authority of the board of directors, and sent to each shareholder, together with the invitation to the annual meeting of the shareholders of the company. At the trial before Kelly, C.B., at the Lancashire Summer Assizes, 1868, it appeared that the auditors had sent in their report, in spite of explanations from a Mr. Bell, which it was now admitted showed that the plaintiff had not been guilty of any misconduct. The Chief Baron expressed his opinion that the letter was a privileged communication, but left the question whether it was a libel to the jury, who found for the plaintiff, with leave for the defendants to move. A rule to enter a verdict for the defendants, having been obtained on the ground that the letter was a privileged communication, and that there was no evidence of the publication of a libel by the defendants.

Holker and *Gorst* showed cause, and contended that the letter was not a privileged communication; and, supposing that it was, there was evidence of express malice on the part of the defendants in causing the libel to be printed, and to be communicated to the absent shareholders, which ought to have been left to the jury.

Manisty and *R. C. Fisher*, in support of the rule, contended that no affirmative evidence of malice was tendered by the plaintiff at the trial, nor did he require the question of express malice to be left to the jury.

The Court (Mellor, J., and Hannen, J.) made the rule absolute. The libel was *prima facie* privileged, as the shareholders had an interest in knowing everything about the conduct of their officers in matters within the scope of their duties, and the directors had no reason to suppose that the auditors had arrived at a wrong conclusion respecting the conduct of the plaintiff. No extrinsic or intrinsic evidence of malice was shown, as printing the letter was a reasonable mode of making the communication, and it could not be necessary that only a shareholder should print or publish it. There had, therefore, been no injustice to the plaintiff in omitting to leave the question of malice to the jury.

Rule absolute.

Queen's Bench.
Nov. 19, 1868.
Feb. 15, 1869.
} Levi *v.* Sanderson.

Costs—County Court Act, 1867 (30 & 31 *Vict. c.* 142)—*Action commenced before passing of Act and continued after it—Statute of Gloucester.*

This was an action for the price of goods sold and delivered commenced before the passing of the late County Court Act, 30 & 31 Vict. c. 142, and continued pending some time after this Act came into operation. In July 1868 it was ordered to be tried before a County Court judge, and a verdict was obtained for 5*l.* only. It was, however, a case of concurrent jurisdiction under 9 & 10 Vict. c. 95, s. 128, so that if the provisions of the former County Court Acts had remained in force the plaintiff would have been entitled as of right to obtain a rule or order for his costs. The master declining to tax the costs, a rule was obtained on behalf of the plaintiff for this purpose.

Patchett showed cause, and contended that the repeal of the former restrictions of the County Court Acts as to costs did not revive the statute of Gloucester, and cited *Butcher* v. *Henderson*, 37 Law J. Rep. Q. B. 133.

Pinder, in support of the rule, contended that as all the restrictive enactments as to costs in the former County Court Acts were repealed before the trial, and as the case was unaffected by the new restrictions introduced by the last Act, the plaintiff was entitled to his costs under the statute of Gloucester. He cited *Restall* v. *The London and South-Western Railway Co.*, 37 Law J. Rep. Exch. 89; and *Mount* v. *Taylor*, 37 Law J. Rep. C.P. 325.

The Court (Lush, J., Hannen, J., and Hayes, J.), after taking time for consideration, now made the rule absolute. Having regard to the importance of uniformity of decision in cases of this nature, they were not disposed to dissent from the view taken by the Common Pleas in the case of *Mount* v. *Taylor*, 37 Law J. Rep. C.P. 325.

Rule absolute.

Common Pleas.
Nov. 12, 1868. Feb. 12, 1869.
} Cropton and Another *v.* Davis and Wife.

Will—Construction of—Equitable Estate in Fee, subject to Defeasance.

The question was as to the construction of a will, by which the testator devised a house to trustees on trust to apply the rents for the benefit of his granddaughter (the defendant Maria), until she should attain the age of 21; but in case she should die under that age, then he devised the house to his daughters, Elizabeth and Caroline, their heirs and assigns, as tenants in common. The residue of the testator's real and personal estate was bequeathed to the plaintiffs, who, as such residuary devisees, claimed the house upon the defendant Maria attaining 21.

The case was argued last Michaelmas Term by

Digby Seymour (*Beresford* with him), for the plaintiffs, and by

J. Brown (*Turner* with him) for the defendants.

Cur. adv. vult.

Brett, J., now (Feb. 12) delivered the judgment of the Court in favour of the defendants, on the ground that the defendant Maria, in whose right the defendants claimed, had an equitable estate in fee in the house in question, subject to defeasance only in case she should die under 21.

Judgment for defendants.

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LORD HATHERLEY, L.C. Feb. 19, 24.

In re THE SOUTH ESSEX RECLAMATION CO. *Ex parte* PAYNE AND LAYTON.

Documents, Production of—Solicitor's Lien—Winding up—Companies Act 1862, *s.* 115.

The official liquidator of this company, which was being wound up, had been refused permission by the firm of solicitors and parliamentary agents which had been employed in obtaining the company's Act, to inspect the documents relating to the company which were in its possession. The ground of the refusal was that the firm claimed a lien on the documents for costs, and that this lien would be prejudiced by such production. On a summons obtained by the official liquidator under the Companies Act 1862, s. 115, V.C. MALINS had held that that section applied to such a case, and that Messrs. Payne & Layton were bound to produce the papers. They appealed.

Mr. Fischer was for the appellants; and

Mr. Cotton and *Mr. Decimus Sturges* for the official liquidator.

The LORD CHANCELLOR was of opinion that, although under the old Winding up Acts solicitors could not have been obliged to produce documents on which they claimed a lien at the instance of an official manager, a new rule had been introduced by the Act of 1862. Section 115 provided that the lien should not be destroyed by pro-

duction, but it gave an official liquidator power to call for production. The VICE-CHANCELLOR'S order must be affirmed. As, however, the case was one of first impression, there would be no costs.

LORD HATHERLEY, L.C. } CRUSE *v.* PAINE.
Feb. 19, 24.

Stock Jobbers—'Registration Guaranteed,' Sale with.

The original plaintiff, Cruse, in November 1865, sold 100 shares in the Contract Corporation to the defendants, who are stock jobbers, with 'registration guaranteed.' The Paines then sold the shares to another firm, which, before the settling day, gave them the name of a Mr. Hutchinson as transferee, and Hutchinson's name was inserted on the transfers, which were executed by Cruse. Hutchinson took the share certificates, but did not execute the transfers on his part, or get his name placed on the register. Cruse's name being still on the register, when an order was made for winding-up the Contract Corporation, he instituted this suit against the Paines for specific performacce and indemnity, and on his death the suit was continued by his executors. Vice-Chancellor GIFFARD (37 LAW J. Rep. Chanc. 711), having held that the effect of the contract of November 1865 was to make the defendants liable to assume all Cruse's liabilities in respect of the shares, and that the executors were entitled to all the rights he had possessed, the Paines appealed. Since this judgment *Coles* v. *Bristowe* and *Grissell* v. *Bristowe* had been decided by the Appeal Courts in equity and at common law respectively.

Sir R. Palmer, Mr. Kaye, and *Mr. J. Napier Higgins* appeared for the appellants; and

Mr. Mellish, Mr. Druce, and *Mr. Marten* for the respondents.

The LORD CHANCELLOR said the one distinction between the present case and *Coles* v. *Bristowe* consisted in the guarantee here of registration. The effect of that was that the contract became one to find a purchaser not only willing to buy the shares, but willing to accept and register them; and that until this was actually done, the original purchaser, the jobber, remained liable. Consequently, Hutchinson not being registered, the Paines were bound to perform the whole of the contract themselves. The VICE-CHANCELLOR'S decree must be substantially affirmed, though with certain variations in form. Thus, instead of an order for the payment of certain moneys to the executors, which they were to pay over on account of their testator's liability on the shares in the Contract Corporation, there would be a declaration that the defendants were liable to procure registrations of the shares of the late plaintiff in the name of some other person than him, on or before November 16, 1865, and that they were now bound to procure the release of his estate from all costs, damages, and expenses on account of his name remaining on the register.

LORDS JUSTICES. } *In re* ABERAMAN IRONWORK COMPANY
Feb. 27. } (LIMITED). PEEK'S CASE.

Company—Winding-up—Contributory.

Appeal by Mr. Peek from an order of MALINS, V.C., fixing him as a contributory to this company for 80 shares. The company was formed and registered in 1864, and the prospectus stated that 1*l.* per share was to be paid on application, and 4*l.* on allotment. On August 26, 1864, Mr. Peek applied for 100 shares, and paid the deposit of 1*l.* per share. On Sept. 6 Mr. Peek received the following letter from the secretary of the company:—

'In reply to your application, the directors have allotted you 80 shares, on which 5*l.* per share must be paid on or before the 15th instant.'

On Sept. 10, 1864, Mr. Peek wrote and sent a letter repudiating the shares, on the ground that the prospectus of the company contained misrepresentations. He never paid the allotment money nor any call. His name was, however, entered on the share register as having become a shareholder on Sept. 5, 1864. The company was ordered to be wound up in 1865.

Mr. Glasse and *Mr. Fischer* for the appellant.

Sir R. Palmer, Mr. Cotton, and *Mr. Ferrers*, for the official liquidator, were not called upon.

Their LORDSHIPS held that as there had been a distinct allotment, and Mr. Peek ought all along to have known or assumed that his name had been placed on the share register of the company, it must now remain there, and consequently the appeal must be refused with costs.

LORD ROMILLY, M.R. } *In re* CHELTENHAM & SWANSEA RAILWAY CARRIAGE AND WAGGON COMPANY. *Ex parte* LITTLE.
Feb. 26.

Company—Shareholder—Delay—Acts of Acquiescence.

The name of Mr. Little was on the register of shareholders of this company, although he had never applied for or consented to take shares, but his name had been written at the foot of an application by another man. Mr. Little first became aware of this on receiving notice of a call in September 1866. He thereupon applied to Mr. Shackleford, the managing director, who admitted the mistake, and told him that all would be right if he signed a form of transfer. Mr. Little signed the form, but the transfer was not completed, for in March 1867 he received notice of another call. He then addressed himself to the board of directors, who promised to inquire into the facts. Nothing more, however, was done; and Mr. Little now applied, under section 35 of the Companies Act 1862, to have the register rectified by striking out his name. A petition for winding up the company was now pending.

Mr. Swanston and *Mr. Graham Hastings* appeared in support of the application.

Mr. Jessel and *Mr. F. C. J. Millar*, for the company, contended that Mr. Little, by assuming to deal with the shares, had admitted himself to be a shareholder until the transfer was completed; and, further, that he was precluded by his delay from denying his liability now that the company was about to be wound up.

The MASTER OF THE ROLLS held that Mr. Little was not precluded by delay. It was the duty of the company in March 1867, when they were informed that he had never applied for shares, to strike his name off the register. And he was not bound by acquiescence. Doing a mere formal act like signing a transfer could not be construed as an adoption of the shares. His LORDSHIP therefore directed the name of Mr. Little to be removed from the register.

Stuart, V.C. Feb. 25. } Cook *v.* Addison.

Trustee and Cestui que Trust—Settlement—Power to Invest in 'Leasehold or Chattel Personal Securities'—Advance of Trust Funds by Trustee on a Leasehold House and Furniture—Trustee both Landlord and Mortgagee of the House—Conflicting Interests—Sale of the Property by the Trustee—Trust Funds mixed up with his own—Liability of the Trustee.

The objects of this suit were to carry out, so far as might be necessary, the trusts of a settlement, dated October 5, 1864, executed on the marriage of the plaintiff, Mrs. Cook, with her second husband, the defendant Henry Cook, to ascertain the amount payable by the other defendants, the trustees of the settlement, or either of them, to the plaintiff in respect of interest on a sum of 520*l.*, part of the settled property; and to obtain a decree that the same defendants might make good and pay such sum to the plaintiff. The bill in the suit also prayed for the removal of the present, and the appointment of new, trustees of the settlement.

The facts of the case were shortly these:—In June 1860 Mr. Ford demised No. 36 Cavendish Square to the defendant Captain Addison, for a term of twenty-one years. In October 1860 Captain Addison furnished and underlet the premises to two ladies of the name of Strutton, as yearly tenants, at a rent of 410*l.* per annum. In and prior to 1864 Mrs. Cook (then Mrs. Newton, a widow), resided with the Misses Strutton. In October of that year she married Mr. Cook, and by the aforesaid settlement of October 5, 1864, certain property was settled upon her for her life, for her separate use, without power of anticipation. The settlement contained a power for the trustees to invest the trust funds 'in, among other things, leasehold or chattel personal securities in England.' In 1865 Captain Addison subdemised the house in Cavendish Square to the Misses Strutton for a term of nine years, at a rental of 310*l.*, payable quarterly, with the usual covenants and powers of re-entry for non-payment of the rent. The Misses Strutton wished to purchase the furniture in the house; and accordingly, at the request and by the direction of the plaintiff and her husband, Captain Addison advanced those ladies a sum of 520*l.* at 5*l.* per cent. out of the trust estate, on the security of a bill of sale of the furniture and a mortgage of the underlease. Captain Addison was paid 500*l.* out of the loan for the furniture. In January 1867 the Misses Strutton became embarrassed, and abandoned possession of the house; leaving 155*l.* owing for a half-year's rent, in addition to which they had paid no interest on the 520*l.* In April 1867 Captain Addison reentered on the premises as landlord, and in May 1867 he sold the residue of the term—viz. 14¼ years—then vested in him, to a Mr. Fowler, who paid him a sum of 100*l.* by way of premium, 250*l.* for repairs, and 550*l.* for the furniture and effects then in the house. Captain Addison received in all the sum of 880*l.* 12*s.* 6*d.*, out of which he paid, for valuations 25*l.*, for commission 66*l.* 12*s.* 6*d.*, and for solicitor's charges, 10*l.* He also claimed (but had since relinquished that) to deduct the further sum of 155*l.* for his rent. The result was that he had in his hands 474*l.* 12*s.* 6*d.* to meet the requirements of the settlement trusts. After considerable negotiation with the plaintiff on the subject, who declined to accept the 474*l.* 12*s.* 6*d.* in satisfaction of her claim in respect of the loan of 520*l.*, Captain Addison, without the consent of the plaintiff, invested the 474*l.* 12*s.* 6*d.*, and a further sum of 45*l.* 7*s.* 6*d.* of his own money—making together the exact sum of 520*l.*—in Consols, in the names of himself and his co-trustee.

The plaintiff had received some dividends on the Consols, but by her bill she claimed to be paid two years' arrears of interest at 5*l.* per cent. on the 520*l.*—viz. from April 30, 1865, to April 30, 1867. That claim Captain Addison disputed.

Mr. E. K. Karslake and *Mr. C. Hall*, for the plaintiff, said that Captain Addison had in fact so mixed up the moneys which he had received from Mr. Fowler with his own, as to make the trust funds undistinguishable therefrom. Moreover he had committed a breach of trust by exercising his rights as a landlord to the prejudice of his duties as a trustee. Under those circumstances the plaintiff was clearly entitled to the relief she prayed by her bill.

Mr. Dickinson and *Mr. F. H. Daly*, for Captain Addison, relied on the power contained in the settlement to lend the trust funds on the security of leasehold and chattel personal property; and on the express direction given to the trustee, by Mr. and Mrs. Cook, to make this particular advance to her friends. They also contended that Mrs. Cook's receipt of the dividends on the Consols, and her wishes, which she had communicated to Captain Addison, not to press the Misses Strutton for payment, amounted to such an acquiescence on her part as to preclude her from now treating the trustees, or either of them, as guilty of a wilful or any breach of trust in the matter.

Mr. Wickens was for Mr. Tatham, the other trustee of the settlement.

Mr. Hanson was for Mr. Cook.

Stuart, V.C., thought that the conduct of the trustees in this case, although not perhaps judicious, had been perfectly honest and well intentioned on their part. The evidence, however, showed that Captain Addison had mixed up the trust funds with his own; and where a trustee so dealt with the property of his *cestui que* trust, it was the law of this Court that the *cestui que* trust might, without further investigation, get from the trustee, having the means of paying it, the whole of the trust property. Captain Addison had clearly, by his exercise of his rights as a landlord, destroyed the security to which the plaintiff looked for the repayment of the 520*l.* and interest at the rate of 5*l.* per cent. Her receipt of the dividends on the Consols was not such an acquiescence in what Captain Addison had done as to bind her; and therefore upon the whole case there would be a declaration that Captain Addison must make good to the trust estate the sum of 520*l.*, with interest at 5*l.* per cent. from the time of the loan to the date of the decree, and he must pay the costs of this suit.

Stuart, V.C. Feb. 25. { *Re* Empire Corporation (Limited). *Re* City and County Assurance Company (Limited.)

Practice—Winding-up—Liquidator—Admissions—Evidence.

These two companies had formerly amalgamated together, and were now being wound up. An application in Chambers for leave to file a bill to annul the amalgamation having been refused, it was arranged between the liquidators of both companies that, in order to avoid the expense of going into evidence, the matter

should be brought before the Court upon a statement of facts agreed to by both the liquidators. Accordingly, two applications by way of motion upon adjourned summonses were now made; one on behalf of the liquidator of the City and County to set aside the amalgamation; the other on behalf of the liquidator of the Empire, to settle upon its list of contributories certain persons who had become shareholders in the City and County in consequence of the amalgamation.

Mr. De Gex and *Mr. Renshaw*, for the liquidator of the City and County, were stopped by

STUART, V.C., who said that, inasmuch as liquidators were only representatives of the shareholders and contributories, questions of this sort should not be tried upon admissions, but the facts should be regularly proved and brought before the Court by affidavit.

Mr. Dickinson and *Mr. Brooksbank* for the liquidator of the Empire.

Mr. Greene and *Mr. Cracknall* for the alleged contributories.

Mr. Villiers for other parties.

STUART, V.C. Feb. 25. } HOPE *v.* HOPE. HOPE *v.* CARNEGIE.

Practice—Administration Suit—Husband and Wife Defendants—Contempt by Wife—Separate Appearance of Husband—Notice of Motion.

Mr. Adrian Hope having died possessed of considerable real and personal estate both in this country and in Holland, a suit was instituted for the administration of his estate, to which his daughter, Mrs. Carnegie, and her husband, Admiral Carnegie, were defendants, and appeared in the usual manner, but no answer was required from or put in by them, and a decree was made in the suit. After this decree, Mrs. Carnegie instituted proceedings in Holland with reference to the property there, making use of her husband's name for the purpose; and an injunction was, on June 25 last, granted on the application of the plaintiff in these suits, to restrain both Admiral and Mrs. Carnegie from continuing those proceedings. A motion to commit both these defendants for disobedience of this injunction was made on behalf of the plaintiff on December 3 last, but it appearing that Mrs. Carnegie was living apart from her husband and out of the jurisdiction of the Court, and that Admiral Carnegie disavowed the Dutch suit, and had done all in his power to obey the order of this Court, the VICE-CHANCELLOR, as no order had been obtained for the separate appearance of the wife, who had alone been guilty of the contempt, refused the motion, and gave liberty to the plaintiff, or any or either of the defendants, to make such application as might be advised, to obtain the separate appearance of Mrs. Carnegie.

Mr. Karslake and *Mr. Waller* now moved on behalf of Admiral Carnegie that the defendant Louisa Albertine, his wife, might be ordered to appear separately from him in all further proceedings in this suit, and that he might not be in any manner responsible for any neglect or refusal by or on the part of his said wife in relation to such proceedings or any of them, or liable to any attachment or process in consequence of such neglect or refusals.

Mr. Dickinson and *Mr. G. W. Hemming*, for the plaintiff, opposed the motion, on the ground that it was irregular and ought to have been made upon notice to Mrs. Carnegie, which had not been given.

Mr. Karslake in reply.

STUART, V.C., said that the order now asked for threw no difficulty upon, but rather assisted the plaintiff, and did not expose the wife to anything she ought not legitimately to be exposed to, and considering that the husband had a right to be relieved from the consequences of a contempt of his wife, which he was powerless to prevent, made an order in terms of the notice of motion without requiring previous service thereof upon the wife, and gave liberty to the plaintiff to serve Mrs. Carnegie in France with the order and with office copies of all or such part of the proceedings in the suit as he might be advised.

MALINS, V.C. Feb. 16, 17, 24. } GIBBINS *v.* EYDEN.

Specific and Residuary Devisee, Payment of Mortgage Debt by—Estate by Curtesy—Bankruptcy of Husband—Assignees.

In this suit a question arose between the devisee of an estate specifically devised and the devisee of a moiety of the testator's residuary real estate, as to the payment of a mortgage debt secured on both estates; the specific devisee contending that the testator, by devising part of the mortgaged estate as 'residue,' had impliedly charged such estate with payment of the debt in exoneration of that which was specifically devised. A further question was raised as to whether the assignees of a bankrupt, who had become entitled to an estate by the curtesy, but whose wife had not been entitled in possession until after the husband had obtained his certificate, could now claim the benefit of such estate; the contention being on the one side that such an interest passed to the assignees as being inchoate at the time of the bankrupt's discharge, and having since ripened into absolute possession; on the other side, that the mere expectancy of an interest to be created only by operation of law could not be regarded as a transmissible interest.

Mr. Cotton and *Mr. Crossley* for the plaintiff.

Mr. Glasse, *Mr. De Gex*, *Mr. J. H. Palmer*, *Mr. Osborne*, *Mr. Shebbeare*, *Mr. A. E. Miller*, *Mr. O. Morgan*, and *Mr. Dryden* for the several defendants.

MALINS, V.C., held (1) that the residuary devise being still specific (*Hensman* v. *Fryer*, 37 Law J. Rep. (N.S.) Chanc. 97) the devisee of the specific estate could not be in a better position than the residuary devisee, therefore the mortgage debt must be borne rateably by each estate comprised in the security; (2) that until the estate which was subject to the curtesy had become vested in the wife in possession, the husband had no interest which could pass to his assignees.

MALINS, V.C. March 1. } *Re* THE CHELTENHAM AND SWANSEA RAILWAY CARRIAGE AND WAGGON COMPANY (LIMITED).

Contempt of Court—Publication without Comment of Statements contained in the Petition for Winding-up a Joint-Stock Company pending the Hearing of the Petition in Court—Costs.

This was a motion to commit the printers and publishers of the *Bristol Daily Times and Mirror* for publishing statements contained in a petition for winding-up the above company. The petition, which contained grave charges of fraud and misconduct against

the directors, was presented by a shareholder on the 11th ult., but had not yet come on for hearing. The whole petition (with the exception of one paragraph stating the number of shares held by the petitioner) was printed in the *Bristol Daily Times* of February 25, without any comment beyond a short preface narrating the fact of its presentation in this Court, &c.

The parties submitting by their counsel, and undertaking not to repeat the offence,

Mr. Cotton and *Mr. Millar*, for the respondents to the petition, did not press for a committal, but claimed costs of the motion.

Mr. Glasse and *Mr. Rigby*, contra, contended that the petition was in fact a public document, being accessible to all creditors and contributories of the company; that its publication without comment was innocent, and did not bring the parties within the jurisdiction of the Court. They distinguished the case from *Daw* v. *Eley*, 38 Law J. Rep. (N.S.) Chanc. 113, s.c. 7 L. R. Eq. 49; and *Tichborne* v. *Mostyn*, 7 L. R. Eq. 55.

Malins, V.C., referring to the general rule as laid down by Lord Hardwicke (2 Atkyns, 469), held that the effect of the publication of the *ex parte* statements contained in the petition must be to 'prejudice the minds of the public against the parties concerned.' The respondents, therefore, were entitled to the protection of the Court pending the final hearing of the petition, and they must have their costs of the present motion.

James, V.C. Feb. 27. } Hill *v.* Hibbit.

Practice—Evidence taken 'de bene esse'—Right to Read Depositions in a Concurrent Suit.

Adjourned summons taken out by Sarah Angus Hay that the depositions of James Hay, taken before one of the examiners of the Court in the suit of *Hay* v. *Hill*, might be read as evidence on the part of S. A. Hay, and be treated as if taken in the above suit *Hill* v. *Hibbit*.

This suit *Hill* v. *Hibbit* was for the administration of the estate of John Wight, intestate, the object of it being to discover who were his heirs and next of kin. The bill was filed March 13, 1868. The usual administration decree was made July 30, 1868, but was not drawn up till November 1868. Miss Hay, who claimed as one of the heirs at law and next of kin of the intestate, was not a party to this suit, and in order to have the evidence of her father James Hay, who was very old and infirm, taken *de bene esse* in support of her claim, it became necessary for her in November 1868 to institute the suit of *Hay* v. *Hill* also for the administration of the intestate's estate. The examination of James Hay was accordingly taken *de bene esse* in this last suit before one of the examiners on Miss Hay's behalf, and on such examination he had been cross-examined by the plaintiff in *Hill* v. *Hibbit*.

Mr. Waller, in support of the application, stated that if it were refused the same witness would have to be again examined and cross-examined by the same parties on precisely the same points.

Mr. Bedwell, for the plaintiff in *Hill* v. *Hibbit*, was not called upon.

James, V.C., said he had no jurisdiction to grant the application.

James, V.C. March 1. } Fielden *v.* Slater.

Injunction—Restrictive Covenant in Lease—Sublessee—Notice—Sale of Spirituous Liquors—Evidence—Affidavit of co-Defendant.

Cause. In April 1854 the plaintiff, and another whose estate subsequently became vested in the plaintiff, in consideration of a rent-charge, granted to the defendant Slater and three others, in fee, a piece of land and buildings adjoining the New Market Place, Blackburn. The indenture of grant contained a joint and several covenant by the grantees, their heirs, executors, and administrators, not to use, or permit to be used, the premises for a public-house, or for the sale of spirituous liquors. In 1858, under a deed of partition, the defendant Slater became solely entitled, subject to the rent-charge, to a part of the premises, comprising a dwelling-house and shop, occupied by the defendant Sefton as yearly tenant, carrying on there the business of grocer and cheesemonger. By indenture of lease dated November 1862 Slater let this house and shop to Sefton for twenty-one years. In 1865 Sefton was appointed agent to Messrs. Gilbey, of London, wine merchants, and as such agent exposed for sale and sold on the premises spirituous liquors in bottles, but not for consumption on the premises, nor in quantities of less than a reputed quart. In March 1868 the plaintiff filed his bill to restrain the defendants from selling, or permitting to be sold, spirituous liquors on the premises, in breach of the covenant in the deed of grant. The lease to Sefton did not refer to the said covenant, and Sefton by his answer alleged he had had no notice thereof. The plaintiff, to prove he had actual notice of the said covenant at the time of taking the lease, claimed to be entitled to read against him an affidavit filed on behalf of his co-defendant, Slater.

Mr. Kay and *Mr. Renshaw* for the plaintiff.

Mr. Druce and *Mr. Simmonds* for the defendant Sefton.

Mr. Amphlett and *Mr. Rowcliffe* for the defendant Slater.

James, V.C., said he was not prepared to hold that plaintiff could, without notice, read the affidavit of one defendant against his co-defendant. But it was not necessary here to prove that defendant Sefton had actual notice of the covenant. On the authority of *Wilson* v. *Hart*, 35 Law J. Rep. Chanc. 569, a lessee who did not inquire into the title of his lessor was bound by constructive notice of a restrictive covenant like this. The sale of spirits in bottles clearly came within the words of the covenant. He must grant the injunction.

Probate and Matrimonial Causes.

Probate. Feb. 16. } Crispin *v.* Cumano.

Order on Unsuccessful Defendant to Pay Plaintiff's Costs as Taxed—Sequestration—Stock in Books of Bank of England in Defendant's Name—Power of Court to Order Bank to Pay over Dividends—1 & 2 *Vict. c.* 110.

Madame Doglioni, the unsuccessful defendant in a testamentary suit, was condemned in the costs of the plaintiff. She appealed to the House of Lords, and died pending the appeal. It was prosecuted by Cumano, her executor, and was dismissed. Orders for the payment of the amount of costs as taxed were made on Cumano. He was out of the jurisdiction, and a writ of sequestration was granted. There was a large sum of stock standing in his name in the books of the Bank of England, and it appeared from the affidavit that he held it as executor of Madame Doglioni, the original defendant in the suit.

Dr. Deane (*Deacon* with him) moved the Court (Feb. 2), on behalf of the sequestrators, to make an order upon the Bank of England to pay into Court the dividends in their hands upon the stock in question, in order that the amount might be made available for payment of the plaintiff's costs.

Dr. Spinks (*Russell* with him) opposed the application on behalf of Cumano.

W. Williams (*Kekewich* with him), for the Bank of England, neither assented to nor objected to the order.

Sir J. P. Wilde, after holding that the decision in *Pratt* v. *Bull* was conclusive of the fact that the Court of Probate does not possess the additional powers and authority indirectly conferred upon Courts of Equity, for the enforcing of their orders, by 1 & 2 Vict. c. 110, continued: In these circumstances the question is whether the Court has power to make the order. It will not be right, even in the furtherance of justice, to assume a power which the Court does not possess. And the limits of the powers which it does possess must be found in the powers hitherto exercised by the Courts of Equity in this direction. The only semblance of a direct authority produced in favour of the proposed order is the case of *Wilson* v. *Metcalfe*, 1 Beavan, 269. But in that case the third person upon whom the order was asked to be made was a consenting party to it. The question, therefore, arises whether an adverse order has ever hitherto been made by a Court of Equity on a third person, to pay over to a creditor money which he owes to the debtor. I cannot find that it has, and I must therefore, with much reluctance, refuse to make such an order.

Probate. Feb. 16, 23. } *In the Goods of* J. S. Swinford.

Testamentary Paper—Execution—Signature not made or acknowledged in Presence of Witnesses.

The deceased duly executed a will, and on the back of it wrote a codicil. The attestation clause was in the usual form, except that it did not state that the witnesses signed in the presence of the testator; but the attesting witnesses could not say whether the testator signed his name in their presence, or that his signature was there when they signed; and nothing was said at the time as to the character of the paper.

Dr. Tristram moved for probate of the will and codicil, and referred to *Gwillim* v. *Gwillim* (3 Sw. & Tr. 200, 29 Law J. Rep. (N.S.) Pr. M. & A. 31), *Vinnicombe* v. *Butler* (3 Sw. & Tr. 580, 34 Law J. Rep. (N.S.) Pr. M. & A. 18).

Sir J. P. Wilde thought that the circumstances did not come up to the decided cases. He accordingly refused probate of the codicil, but intimated that the parties might propound it if they thought fit.

Probate. Feb. 23. } *In the Goods of* Andrew Russell.

Executor Renouncing—Grant of Administration as Attorney to Renouncing Executor—Rule 50—20 & 21 *Vict. c.* 77, *s.* 79—*Practice.*

The deceased died domiciled in Australia, leaving a will and two codicils, in which he appointed Inglis, Taylor, Fiskin, Larnach, and Moore his executors. On the renunciation of Inglis, Moore, and Larnach, probate was granted to Taylor and Fiskin by the Superior Court of the Colony of Victoria; and exemplified copies of the will and codicils, together with a power of attorney authorising him to take out administration on their behalf, were forwarded by Taylor and Fiskin to Larnach, who was resident in London.

C. A. Middleton moved for letters of administration (with the will and codicils annexed) to Larnach, as attorney for the executors. He referred to Rule 50, and section 79 of the Court of Probate Act 1857.

Sir J. P. Wilde held that Rule 50 did not apply to such a case, and granted the application; but required that Larnach should file a fresh and definite renunciation, which should beyond all question strip him of the character of executor, and bring him within the operation of section 79 of the Probate Act.

Divorce and Matrimonial Causes. Feb. 23. } George *v.* George.

Dissolution of Marriage on Wife's Petition—Rights of Husband in Wife's Freehold Estate after Divorce—Annuity to Wife Secured on her Property—Practice.

The wife obtained a decree *nisi* for dissolution of the marriage on the ground of cruelty and adultery. During the coverture she inherited a small estate of freehold, the rents of which, amounting to 30*l.* a year, the husband (the respondent) continued to receive.

Inderwick, for the petitioner, in moving for the decree *absolute*, asked the Court to declare that the respondent's rights in the petitioner's property had ceased by virtue

of the divorce; or, if the Court were unwilling to pronounce such a judgment, to order the respondent to settle on the petitioner an annuity equivalent to the rent of the property, and to secure it on the property.

Pritchard, for the respondent, contra.

The Judge-Ordinary declined to pronounce any judgment in the matter, inasmuch as the decision of the Court could in no way bind the property; but ordered the respondent to pay to the petitioner an annuity of 30*l.*, and to secure it on the property—the order to state that the wife's rights to the property (whatever they were) were reserved, and the annuity to cease in the event of her becoming entitled to the property as a feme sole.

High Court of Admiralty.

Admiralty Court. Feb. 10, 16. } The Royal Charter.

Damage—Compulsory Pilotage—Pilot alone to Blame—Costs.

This was a cause of damage in respect of a collision which took place between the schooner Royal Charter and the brig Clarinda, about 2 o'clock in the afternoon of October 29 last. The cause was instituted in the sum of 500*l.*, and to save expense the parties had agreed upon a special case, from the facts in which it appeared that the Clarinda was at anchor, and it was admitted that no blame attached to her, and that the schooner had a pilot on board whom her owners were compelled to take. The sole question at issue between the parties was whether or not the pilot was alone to blame for the collision.

Dr. Deane and *E. C. Clarkson* appeared for the plaintiff, the owner of the Clarinda; and

Butt and *Pritchard* for the defendant, the owner of the Royal Charter.

The cause was heard on the 10th, and the learned judge held that the pilot was alone to blame. The owner of the Clarinda was, therefore, held not entitled to recover.

Butt and *Pritchard* moved to condemn the plaintiff in costs. The owner of the Royal Charter had confined his defence to one issue, and had succeeded upon that, and therefore ought to have his costs. Though the Court usually gives no costs when the pilot is held to be alone to blame, the late learned judge in one case stated that if no other issue were raised except whether the pilot was alone to blame, and that issue were found in favour of the defendant, he would give costs, and he did so in a subsequent case. The Batavier, 10 Jur. 204 Notes of Cases, 356; the Castor, 6 Law J. Rep. (N.S.) 106.

Dr. Deane and *E. C. Clarkson* contra. The result of such an issue depended so entirely upon facts within the knowledge of the defendant that the plaintiff ought to be entitled to have the facts investigated without liability to pay the costs of the other side. Without any such liability the hardship would be sufficient that the owner of a vessel having suffered damage from no fault of his own should, nevertheless, be unable to obtain redress.

Cur. adv. vult.

Sir R. Phillimore.—The owner of the Royal Charter admitted that that vessel was the wrongdoer, and pleaded that she was under the direction of a pilot, who by compulsion of law was at the time of the collision in charge of her. The Clarinda replied in effect that the master and crew of the Royal Charter did not obey the orders of the pilot, and that the collision was caused by such disobedience. The defendant asked for costs, on the ground that he had admitted from the first that his vessel was the wrongdoer. The counsel for the Clarinda contended that costs ought not to be given, principally on the ground that it was impossible to know before the trial what was done on board the Royal Charter. The plaintiff, however, in this case produced as his witness the pilot of the defendant's vessel, and, considering all the circumstances of the case and the present state of the law with respect to compulsory pilotage, the Court was of opinion that the defendant was entitled to his costs.

Decree accordingly.

Notes of Recent Decisions.

CHANCERY.

CONTEMPT OF COURT.—The solicitor of a defendant wrote anonymous letters to a newspaper, impeaching the novelty and usefulness of a patent claimed by the plaintiff, and the subject of the suit. It was ordered that the solicitor should be committed for contempt of Court; the order not to be enforced if he inserted an apology in the newspaper and paid the costs of the motion.—*Daw* v. *Eley*, 38 Law J. Rep. Chanc. 113.

Semble—By publishing controversial letters in reply, or by delay, plaintiff would have lost his right to complain.—*Ibid.*

COPYRIGHT.—The registration of a book at Stationers' Hall, under the Copyright Act, 5 & 6 Vict. c. 45, is not good unless the entry state the day on which the first publication took place, as well as the month and year. Therefore, where a plaintiff sued to restrain an infringement of his copyright in a book, having registered the month and year of first publication, but without specifying the day, his bill was dismissed with costs.—*Mathieson* v. *Harrod*, 38 Law J. Rep. Chanc. 139.

EVIDENCE.—B., a person of loose and drunken habits, had for many years lived on friendly terms and in constant communication with his relations, by whom he was chiefly supported, his only other source of income being the dividends of 1,000*l.*, to which he was entitled for life, and the half-yearly payment of which he regularly demanded so soon as it became due. He was last seen on August 12, 1860, being then in an abject and almost dying condition, and had never since been heard of. Held, that his non-application for the half-yearly dividend, which became payable in October 1860, taken in conjunction with the other circumstances of the case, was sufficient evidence to raise the presumption of his death before November 14 in that year.—*In re Beasney's Trust*, 38 Law J. Rep. Chanc. 159.

SOLICITOR AND CLIENT.—An assignment for the benefit of creditors under the Bankruptcy Act, 1861, vests the property of the assignor in the trustees of the deed, as completely as his actual bankruptcy would have vested it in his assignees. Therefore such assignor is an unnecessary party to a suit for the specific performance of a contract entered into by him before the assignment. And, though the execution of the assignment amounts to an implied authority to the assignee to use the assignor's name for all necessary purposes, yet where the solicitor of the assignee unnecessarily joined the assignor as co-plaintiff with the assignee in such a suit as above mentioned, an application to remove his name was acceded to, and the solicitor was ordered to pay the costs.—*Fenton* v. *the Queen's Ferry Wire Rope Co.*, 38 Law J. Rep. Chanc. 136.

COMMON LAW.

ANCIENT LIGHTS.—The right to light may be acquired by actual enjoyment thereof under the Prescription Act (2 & 3 Wm. IV. c. 71), s. 3, the house having been structurally complete, the floors laid and the windows put in for a period of more than twenty years, although the internal fittings had not been completed, nor the house put in a state fit for habitation, nor in fact inhabited until a period within twenty years.—*Courtauld* v. *Legh*, 38 Law J. Rep. Exch. 45.

ATTORNEY.—The lien of an attorney for costs is confined to cases where there are fruits of the litigation actually acquired, such as a clean verdict or a judgment or an acknowledgment of a debt; but the Court will not interfere to cause it to attach where, after verdict and before judgment, a rule for a new trial has been obtained, so as to prevent a settlement of the action between the parties, without prior satisfaction of the attorney's costs.—*Sullivan* v. *Pearson*, 38 Law J. Rep. Q.B. 65.

BANKRUPTCY.—Defendants accepted certain bills for J. & Co., who undertook to provide funds before maturity, and, as collateral security, deposited with defendants goods and bills, which bills were indorsed by J. & Co. to defendants, and became due on the same day as the said acceptances of defendants. Before that day J. & Co. were adjudged bankrupts, having previously given their assent to the sale of the goods and to defendants receiving the proceeds. The bills which had been deposited as such collateral security were paid at maturity, and these, together with the proceeds of the sale of the goods, left a balance after providing for the said acceptances of defendants for securing which the deposit had been so made. In an action for such balance by plaintiffs who were assignees in bankruptcy of J. & Co.,—Held, that, as regards the proceeds of the sale of the goods, the bankrupts had given credit to defendants within the meaning of the mutual credit clause of the Bankrupt Act, 12 & 13 Vict. c. 106, s. 171, but that as regards the money received from the bills which had been so deposited as collateral security, no such credit had been given, and therefore defendants were not entitled to retain such last-mentioned money against a sum due to them from estate of the bankrupts.—*Astley* v. *Gurney*, 38 Law J. Rep. C.P. 111.

PARLIAMENT.—A. occupied exclusively and as sole tenant rooms in a dwelling-house, which were not so severed from the rest of the building as to constitute a house. A. gave notice to the overseers that he occupied a part of the dwelling-house, and that he claimed to be rated for the same to the relief of the poor, and the overseers thereupon entered his name in the rate-book jointly with the other occupiers of the dwelling-house, but no separate rating was made with reference to A. Held, that it not appearing that the part of the house which A. occupied was separately rated, A. was not the occupier of a dwelling-house within the meaning of the Representation of the People Act 1867 (30 & 31 Vict. c. 102. s. 61).—*Cuthbertson* v. *Hains*, 38 Law J. Rep. C.P. 109.

VENDOR AND PURCHASER.—Property described in the conditions of sale as a freehold residence was purchased at a sale by private contract. One of the terms of these conditions was, 'the abstract of title will commence with a conveyance, dated April 17, 1860, and no purchaser shall investigate or take any objection in respect of the title prior to the commencement of the abstract.' The deed in question conveyed the property in fee subject to the covenants and conditions in a deed of 1850. What these covenants and conditions were did not appear.—Held, that the defendants had not deduced a title to the property in compliance with their contract, as they were bound notwithstanding the conditions to show that a clear freehold title passed by the conveyance of 1860.—*Phillips* v. *Caldcleugh*, 38 Law J. Rep. Q.B. 68.

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Courts of Equity.

LORDS JUSTICES. March 5. } MANBY *v.* ROBINSON.

Interpleader—Payment into Court—Injunction—Undertaking as to Damages.

The plaintiff owed the defendants, a firm of solicitors carrying on business under the style of Robinson, Webster & Robinson, a sum of 570*l.* for taxed costs, for the payment of which, within twenty-one days, the usual order had been made by the MASTER OF THE ROLLS on December 24, 1868. The defendants Robinson and Webster had dissolved partnership some time before, and at the date of the above order a suit for the settlement of the partnership accounts was pending between them, and each of them had demanded payment to himself of the 570*l.* Under these circumstances the plaintiff had filed an interpleader bill, offering to pay the amount into Court, and praying for an injunction. On the matter coming on on motion, the defendant Webster opposed it *in toto*, on the ground that the plaintiff was acting in collusion with Robinson, and supported his allegation by a long affidavit, to which the plaintiff filed one in reply.

MALINS, V.C., made no order on the motion, the defendant Webster undertaking not to enforce the order of the MASTER OF THE ROLLS until March 9 inst., in order to afford the defendant Robinson time to move in the suit of *Robinson* v. *Webster* for an injunction if he should be advised so to do.

From this order the plaintiff appealed.

Mr. John Pearson and *Mr. Currey* for the appellants.

Mr. Glasse and *Mr. Townsend* for the respondents.

Their LORDSHIPS were of opinion that the plaintiff was entitled to the usual order for payment of the money into Court, and for an injunction, on his giving the usual undertaking as to damages. They therefore discharged the order of the VICE-CHANCELLOR.

LORDS JUSTICES. March 6. } WHITE *v.* HERRICK.

Ward of Court—Married Woman—Settlement.

The question in this appeal was whether the Court would, contrary to the wishes of the parties, settle a small sum of about 150*l.*, which was in Court, belonging to a married woman, who had been a ward of Court, but had married shortly after coming of age. The MASTER OF THE ROLLS had refused to allow it to be paid out on the petition of the lady presented by her next friend.

Mr. Speed for the appellant.

Mr. Campbell, for the husband, appeared to consent to the fund being paid to his wife.

Their LORDSHIPS thought that the lady ought to be examined by the Court, but intimated their intention to pay the money to her if she appeared and, being examined separately, desired it.

LORD ROMILLY, M.R. March 3. } GRISSELL *v.* MONEY.

Building for Public Purposes—Sale by Order of Court.

The plaintiff had as contractor erected a drilling hall for a Volunteer Rifle Corps, of which the defendant was commanding officer, and in a former suit between the same parties he had obtained a decree giving him a lien on the property for the sum due to him. This was a bill to enforce that lien by sale.

Mr. Jessel and *Mr. Kekewich* for the plaintiff.

Mr. Southgate and *Mr. Simpson*, for the defendant, argued on the authority of *Darke* v. *Williamson*, 25 Bea. 622, that the property being for public purposes could not be sold.

The MASTER OF THE ROLLS held that the case cited did not apply, for there a lien upon the deeds only was given. In the former suit between the present parties, the intention was to give by the decree a lien which could be enforced by sale.

LORD ROMILLY, M.R. March 8. } DARE VALLEY RAILWAY CO. *v.* RYS.

Lands Clauses Consolidation Act, 1845, *s.* 23.

The Dare Valley Railway had taken some land from the defendant, the price of which had been settled by arbitration. Upon motion by the defendant V.C. GIFFARD (37 Law J. Rep. (N.S.) Chanc. 719) made an order referring the matter back to the same arbitrator, putting the defendant on terms not to claim more than 5*s.* for surface damage. This order was never acted on, but after more than three months had expired the defendant took proceedings to have the value assessed by a jury. This was a bill to restrain his doing so, which was demurred to.

Mr. Baggallay and *Mr. Freeling* for the demurrer.

Mr. Southgate and *Mr. Field*, for the bill, contended that as the defendant had taken no further proceedings to amend the award, it stood as originally made, a final award.

The MASTER OF THE ROLLS held that the effect of the reference back was to set aside the award as it stood, and nothing having been done in the matter during three months, the defendant had a right to get the value of his interest assessed by a jury. The demurrer was allowed.

LORD ROMILLY, M.R. March 8. } *Re* LANGHAM HOTEL COMPANY.

Voluntary Winding-up—Joint Liquidators—Remuneration.

Two liquidators had been appointed in the voluntary winding-up of the above company. The winding-up was continued and completed under the supervision of the Court; and the parties having submitted to the jurisdiction for that purpose, the chief clerk settled the amount of remuneration to be paid to the liquidators. One of them took out a summons to apportion this between them.

Mr. Jessel and *Mr. Graham Hastings*, for the applicant, said that as the Court had determined that liquidators were to be paid as between themselves and the company, according to the time expended by them on the business of the winding-up, the same rule ought to be applied between the liquidators.

Mr. Southgate and *Mr. Baldwin Smith*, contra, were not called on.

The MASTER OF THE ROLLS refused to make any order, as the division of the remuneration between them was a matter to be settled by themselves, they being in the position of partners. If they had no agreement as to their proportions, the remuneration was to be divided equally.

LORD ROMILLY, M.R. March 8, 9. } *Re* DYKE'S TRUSTS.

Power of Appointment—Defective Execution—Conversion—Lands Clauses Consolidation Act, 1845.

A railway company had taken lands of the testator in this matter, part of which belonged to him absolutely, and over the other part he had a power of appointment by deed. He agreed with the company that the price should be fixed by two arbitrators, who undertook to make an award. On his death, before completion of the contract, the question arose whether there had been such a defective execution of the power as the Court would assist, and consequent conversion of the property.

Mr. Fisher for those taking in default of appointment.

Mr. Jackson contra.

Mr. Droop for the company.

The MASTER OF THE ROLLS said that the test was, whether there was such a contract as the company could have enforced against the testator, and that there was in this case. The Court would, therefore, assist the execution of the power.

STUART, V.C. March 6. } WOLFF *v.* VANDERZEE.

Mortgagee in Possession, Sale by—Misstatement in Particulars—Loss on Sale—Form of Decree.

F. E. Tucker mortgaged a brewery and a tap to the defendant. Default was made, and the mortgagor becoming embarrassed in circumstances, the defendant took possession. On September 13, 1866, the mortgagor was adjudicated bankrupt; and on the 20th of that month the defendant sold the property by auction under particulars of sale which described the tap as let at 150*l.* per annum. The plaintiff was appointed creditors' assignee on October 10, and filed this bill against the defendant, stating amongst other things that the tap was in fact let at 182*l.* per annum, and asking that the accounts of the defendant might be opened, and an account taken against him, charging him *inter alia* with any loss upon the sale by reason of any misstatement in the particulars. Much evidence was produced; and it appeared that, there being some uncertainty as to the actual tenancies of the property, the mortgagee's auctioneer, prior to the sale, inquired of the tenant of the tap, who stated his rent at 150*l.*, but refused to produce the agreement under which he held; and that the auctioneer made no inquiry of the solicitor who prepared the agreement, nor was any inquiry made of the mortgagor.

Mr. Serjeant Sargood and *Mr. Ince* for the plaintiff.

Mr. Dickinson and *Mr. H. M. Jackson* for the defendant.

The case of *Marriott* v. *The Anchor, &c.*, 30 Law J. Rep. (N.S.) Chanc. 571, was referred to in the arguments.

Stuart, V.C., after stating that this was a case in which great care and circumspection was necessary on the part of the mortgagee, who was selling the property of others as well as of himself, and that when a mortgagee failed in any proper precaution he was liable as for wilful neglect and default, made the following decree:—'It appearing that, having regard to the particulars of sale and the course pursued in offering the said brewery and premises for sale on Sept. 20, 1866, as in the pleadings mentioned, the same was not sold under circumstances calculated to produce the best price that could reasonably be obtained, order that the chief clerk do ascertain and state whether the money produced by the said sale was a fair and proper price, and more or less than would have been fixed for a reserved price in case the said brewery, plant, and premises had been sold under a decree of this Court; and in taking the accounts hereinafter directed the defendant is to be charged with so much as the chief clerk shall ascertain and state that the price for which the same was sold is less than would have been fixed for such reserved bidding as aforesaid. Usual accounts against defendant as mortgagee in possession. Tax the costs of the plaintiff of so much of the suit as relates to the question whether the defendant should be charged with any loss accrued upon the sale of the said mortgaged premises, and reserve the question as to the payment of the said costs. Tax the defendant's costs of the rest of this suit, and order that in taking the accounts hereby directed such last-mentioned costs be charged against the plaintiff. Adjourn further consideration.' His Honour added that the form of the decree in *Marriott* v. *The Anchor*, where the mortgagee was charged with the value of the ship at the time he took possession, was very unusual.

Malins, V.C. } Marriott *v.* Abell.
Feb. 23. }

Will, Construction of—'Survivors or Survivor'—Death of all Legatees before Period of Distribution—Divesting Clause.

A testator gave all his property upon trust, after conversion, to invest and pay the income to Martha Barton for life, and after her death to transfer the whole fund to five persons therein named in equal shares; their interests to be vested at the time of his decease.

By a codicil reciting the above gift, the testator directed his trustees to transfer the fund, after Martha Barton's death, not only to the five persons named in the will, but also to three others, in equal shares, with a declaration that, in case of the death of any of them before the death of Martha Barton, 'the share or shares of him, her, or them so dying shall go to the survivors or survivor of them equally, share and share alike.'

The eight legatees survived the testator, but all of them predeceased Martha Barton; the question now was, who became entitled at her death under the gift in remainder.

Mr. Cadman Jones, for the representatives of the last survivor, relied on *Crowder* v. *Stone*, 3 Russell, 217, and argued that the word survivor must be taken in its natural sense with reference to the survivorship of the legatees *inter se*.

Mr. Chitty, *Mr. W. Barber*, *Mr. Herbert Smith*, and *Mr. Rodwell* for other claimants.

Malins, V.C., held that all the legatees having died in the lifetime of the tenant for life, the divesting clause ceased to operate, and the representatives of each legatee were entitled to the original gift of one-eighth share in the fund. His Honour doubted the authority of the decision in *Crowder* v. *Stone*.

Malins, V.C. } Goodford *v.* The Stonehouse and
March 3. } Nailsworth Railway Co.

Railway Companies—Specific Performance—Purchase of Land—Parties.

This was an ordinary vendor's suit for specific performance of an agreement by the above railway company to purchase certain lands. The only point raised was whether the Midland Railway Company, who since the date of the agreement had acquired Parliamentary powers for working the line, and were now in actual possession of the land in question, were properly made defendants to the suit.

Mr. J. Pearson and *Mr. Fry* appeared for the plaintiffs.

Mr. Glasse and *Mr. Winterbotham* for the Stonehouse Railway Company.

Mr. Cotton and *Mr. Speed*, for the Midland Railway Company, claimed their costs, and contended upon principle that they were unnecessary parties to the suit, not having been parties to the contract which the bill sought to enforce. In practice it had become an onerous burden upon the main lines of railway in the kingdom to be brought into Court merely as formal parties to suits of this description.

Malins, V.C., held that the Midland Company, being in fact in sole possession of the land under a parliamentary title, were necessarily parties to this suit, the object of which was to restrain their occupation of the land in default of payment of the purchase-money. His Honour fully agreed with the principle of the decisions upon this point, and was unable to distinguish the present case from the Mid-Hants Railway Company's case, 37 Law J. Rep. (N.S.) Chanc. 64.

Malins, V.C. } *In re* Potter's Trusts.
March 5, 6. }

Will, Construction of—Substitutionary Gift—Death of Legatee leaving Issue—(1) *Previous to Date of Will—*(2) *Previous to Death of Testator.*

Petition under 10 & 11 Vict. c. 96.

Testator George Potter (who died in 1834), by will dated August 8, 1830, gave the residue of his estate upon trust for Elizabeth King for life. In the events which happened, 'as to one-fourth share thereof for his nephews and nieces, the children of his late sister Mary Lamb, in equal shares and proportions as tenants in common, and in case of the death of any of his said nephews and nieces leaving issue, then he directed that such issue should take the share that his, her, or their deceased parent would have taken if living.'

Elizabeth King died in 1865. This petition was presented in 1866 to ascertain the rights of the various parties thereunder, and certain inquiries were then ordered. The chief clerk made his certificate, finding that Mary Lamb had had twelve children, of whom two died without issue before 1830; two died in the lifetime of the testator, but their issue could not be found; three were still living; three died previous to the making of the testator's will in 1830, leaving issue still living; one died subsequent thereto, but before the testator's death in 1834, leaving issue still living; and one died in

1853, subsequent to both events, but before the death of the tenants for life, also leaving issue now living.

The petition now came on for further hearing, the principal question being whether under the above-stated clause the issue of any nephew or niece dying (1) before the date of the will (2) after the date of the will, but before the death of the testator, could take.

Mr. W. Pearson for the petitioner.

Mr. Mackeson and *Mr. J. W. Chitty* for respondents.

The Vice-Chancellor declined to follow the decision of Sir William Grant in *Christopherson* v. *Naylor*, 1 Mer. 320, and held that the undoubted intention of the testator, in favour of the issue of any nephew or niece whether living or not at the date of the will, must be allowed to prevail. He also dissented from *Stewart* v. *Jones*, 3 De G. & J. 534, with reference to the issue of those who died in the lifetime of the testator, but after the date of the will. His Honour considered that there was no distinction between a bequest to a class, with substitution to the issue of such members of the class as were dead, and a similar bequest to a class followed by a gift of the share of any deceased parent to his or her issue.

James, V.C. March 5. } Maitland *v.* The Chartered Mercantile Bank of India, London and China.

Letter of Credit—Third Persons not Affected by Extraneous Agreement.

The plaintiffs, a London firm of merchants, were the correspondents of Fletcher & Co., a Shanghai firm, and as such they obtained from the National Bank of Scotland letters of credit, which were printed on the margin of a blank bill of exchange, and authorised Fletcher & Co. to fill up the bill for a limited amount, and engaged that the bill should be honoured by the drawers, who were the London agents of the National Bank, if presented together with the letter of credit within given time. The plaintiffs guaranteed that Fletcher & Co. should keep the National Bank or Glyn & Co. in funds to meet any bill so drawn. By their bill in this cause they alleged that by the known and ordinary course of mercantile dealing, and by actual agreement between the plaintiffs and Fletcher & Co., bills of exchange drawn under the letters of credit were only to be used to raise money to pay for goods consigned to England, and that the shipping documents were to be forwarded to the plaintiffs by the mail which carried the bills of exchange; and their case was that some members of the firm of Fletcher & Co. had drawn bills in favour of the Chartered Mercantile Bank of India, London, and China for purposes to which the letters of credit were not properly applicable, and that the Chartered Bank, through their manager, were affected with notice that such bills were drawn in violation of the usual course of mercantile dealing and the agreement between the parties. The bills were still in the hands of the Chartered Bank, and the plaintiffs prayed that they might be delivered up to be cancelled.

The Chartered Bank by their answer denied the existence of the course of dealing alleged by the bill, except as to 'documentary credits,' in which it was expressed that the bills drawn under them were to be accompanied by the shipping documents of the goods against which they were drawn. No such stipulation was contained in the present letters of credit, which were therefore 'open,' *i.e.* not documentary credit.

Mr. Cotton and *Mr. Methold* for the plaintiffs.

Mr. Willcock and *Mr. Bowring* for the Chartered Bank.

Mr. De Gex and *Mr. Stirling* for Fletcher & Co.

Mr. Druce for Glyn & Co.

Mr. Druce and *Mr. Morris* for the National Bank.

James, V.C., held, on the authority of *Ex parte The Asiatic Banking Corporation*, 36 Law J. Rep. (N.S.) Chanc. 222, that the holders of the bills were not affected by any agreement, restricting the user of the letters of credit, which did not appear on the face of the bills or letters of credit.

Bill dismissed with costs.

Probate and Matrimonial Causes.

Probate. Feb. 23. } *In the goods of* John Howard.

Will—Codicil—Revocation.

John Howard, late of Staley, Cheshire, died, leaving a will and two codicils. By the will, executed on February 5, 1859, he gave and devised all his real and the residue of his personal estate to Samuel Cocker and William Sunderland in trust, and he also appointed them his executors and guardians of his three minor children. The first codicil revoked all the devises and bequests in favour of his son, and the second was as follows:—'This is a second codicil to the last will and testament of me,' &c. 'I absolutely revoke and make void all bequests and dispositions in my said will, and I bequeath all my property to my housekeeper, Margaret Wright, and appoint Mr. Henry Heap one of my executors, Robert Heap another of my executors, and Margaret Wright aforesaid my executrix.'

Bayford moved for probate of the three papers to Robert Heap and Margaret Wright.

Sir J. P. Wilde made the grant, power being reserved to the executors named in the will if entitled to come in and prove.

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Cases in the House of Lords.

House of Lords. Feb. 25. — *In re* Leeds Banking Company, Jackson and Holmes v. Turquand, Official Liquidator.

Company—Contributory—Executors.

A certain number of reserved shares in a company were offered by the directors to the existing shareholders in the proportion of one share of the new issue for every five original shares held by any member, and the shareholders were invited to apply for a further allotment of the reserved shares, in case any should remain over not taken up or distributed, in consequence of the said offer. The appellants, who were executors of a deceased shareholder, agreed to take thirty-six of the shares thus offered, being the number to which they were entitled in respect of their testator's original shares, and they also applied for nine additional shares. Both the thirty-six shares and the nine additional shares were allotted to them. The terms of the letters of allotment both of the thirty-six and the nine shares were that 30*l.* per share was to be paid on or before October 1, 1864, in which case the shares would be entitled to one quarter's dividend at the end of the year. And as to the nine additional shares, it was further stipulated that, if the 30*l.* per share was not paid on or before the day named, those shares would be forfeited. On September 19, 1864, the company stopped payment, and on September 26 a petition for winding it up was presented, and the respondent, as the official liquidator appointed on such petition, put the appellants on the list of contributories in respect of the whole forty-five shares.

The appellants applied to be removed, mainly on three grounds—(1) Because the contract was *in futuro*, that is to take shares at a future time; (2) because they

contracted in their representative character; (3) because they had been deceived by a false report which the directors had made of the state of the bank on February 1, 1864. Before the case was argued, it had been decided in *Addinell's case*, arising out of this same winding-up, 35 Law J. Rep. (N.S.) Chanc. 77, 307, that there was no binding contract *quoad* the additional shares. The claim in respect of these nine additional shares was therefore abandoned. But as to the thirty-six shares, KINDERSLEY, V.C., held that the appellants were individually liable as contributories. In so ruling, the VICE-CHANCELLOR followed decided cases, namely, —as to the point that the contract was *in presenti*, the case of *Ex parte Chalk Barrett*, 34 Law J. Rep. (N.S.) Chanc. 558—as to the point that though the appellants were only entitled to shares as being executors, they were liable in their undivided character, the case of *Ex parte Dobson, Fearnside, and Deane*, 35 Law J. Rep. (N.S.) Chanc. 307, and in *Barrett's case*, it was decided that as the report of the directors which misled the plaintiff was made only for the members of the company and not for circulation among the outside world, the allottee of these shares could not repudiate the contract on the ground of misrepresentation, because if he were a member of the company already the misrepresentation was made by a body of which he was a component part, and if he were an outsider, the report was not made for him at all. Hence this appeal.

Sir Roundell Palmer and *Mr. Wickens* for the appellants.

Mr. Glasse, Mr. Cotton, and *Mr. Kekewich*, for the respondents, were not called on.

Their LORDSHIPS affirmed the decision of the VICE-CHANCELLOR.

House of Lords. March 8. } THOMPSON *v.* HUDSON.

Penalty—Agreement to accept Part of Debt in Discharge of the Whole—Proviso on certain Default by the Debtor reviving the whole Debt.

This was an appeal from an order of the MASTER OF THE ROLLS affirmed by Lord CHELMSFORD. The respondent, George Hudson, was indebted to the York and North Midland Railway, and a declaration and order had been obtained by the company in a suit in Chancery, that he was bound to pay to them 54,590*l.* by two instalments on two days named. The order was registered as a judgment. Two other suits were also pending between the same parties, in which the company claimed 4,104*l.* and 14,831*l.* The respondent being thus indebted, made an agreement with the company that they should accept 50,000*l.* in discharge of the whole debt, upon his, Hudson's, executing within fourteen days a mortgage to them for 50,000*l.*, and 1,000*l.* for their costs, of certain estates he had then contracted to sell for a much larger sum, and also upon his paying them 20,000*l.* on the day fixed for the completion of the said purchase, on which day he was also to execute a fresh mortgage of another estate to secure the repayment of the 30,000*l.* by instalments; and the company agreed, on the punctual fulfilment of the above terms, to forego the rest of their claim; but if the said George Hudson should fail in performing all or any of the stipulations on his part in the agreement contained, the company were to be at full liberty to recover the whole of the principal sums and interest found to be due to them under the order and in the several suits. George Hudson executed the interim deed of mortgage first stipulated for, and it contained a very ample proviso for reviving the whole of the company's original claim in the event of Hudson's failing in any part of his agreement. The mortgage was to the appellants in trust for the company. Hudson was unable to pay the 20,000*l.* on the day named, and further time was granted him, and a fresh agreement made, giving the company certain advantages; but he failed to raise the money by that time. And in 1863 the company and their trustees filed their bill against Hudson and the various incumbrancers on his estates, and on the inquiry being taken in Chambers as to what was due on the several incumbrances, the question was raised whether, Hudson having made default, the whole original debt was not revived. The summons was adjourned into Court, and the MASTER OF THE ROLLS made his order confining the debt to the amount agreed to be taken; and on appeal Lord Chancellor CHELMSFORD (Lord Justice TURNER dissenting) affirmed His LORDSHIP'S order, on the ground that this was a case differing widely from the case of a creditor agreeing to take less than his debt on condition of punctual payment. It was the case of a creditor agreeing to take less than his debt upon condition that a portion be paid at a given day, and a mortgage executed for the residue. That the original agreement having been materially varied, they must be held to have waived the condition, and the stipulation inserted in the mortgage formed no part of the original agreement, and was of the nature of a penalty.

Sir R. Palmer, Mr. Mellish, with them *Mr. George Williamson*, for the appellants.

Mr. Jessel and *Mr. Jackson* for the respondents.

Their LORDSHIPS overruled the order of the Lord Chancellor CHELMSFORD and the MASTER OF THE ROLLS.

House of Lords. March 9. } STANHOPE *v.* COLLINGWOOD.

Settlement—Construction—Trusts for Children excepting a Son 'for the time being entitled' to an Estate in Tail Male —Bar of Estate Tail—Period of Trust Funds Vesting.

By a settlement made in September 1820, upon the marriage of Mr. and Mrs. Collingwood, certain trust funds were settled (in default of appointment by the husband and wife) upon trust after the death of the survivor of the husband and wife for the children of the marriage, 'other than and except an eldest, second, or only son, for the time being entitled,' under a certain will recited in the said settlements, to an estate at North Dissington, for an estate in tail made in possession or remainder immediately expectant on the decease of the said intended husband. And the settlement declared that the shares of the children in the unappointed trust funds were to vest in sons at twenty-one. There were three children of the said marriage—a son and two daughters, of whom the son, Edward Collingwood, became entitled under the said will to the North Dissington estates for an estate in tail made in expectancy on the decease of his father; but having attained twenty-one in his father's lifetime, he joined with him in barring the entail and resettling the estate. Under the limitations of the resettlement, the estates were limited to the use of the father for life, with remainder to the use of Edward Collingwood, the son, for life, with remainder to the use of his first and other sons in tail general, with divers remainders over, the ultimate limitation

being to the use of the right heirs of Edward Collingwood, the son. Mrs. Collingwood died in 1840. Mr. Collingwood (the father) appointed one moiety of the trust funds comprised in the settlement to one of his daughters, and he died in August 1866. At his death the other moiety of the trust funds remained unappointed. This suit had been instituted by the trustees of the settlement to obtain the decision of the Court whether Edward Collingwood, the son, was entitled to participate with his sister, Cecil Collingwood, in whose favour no appointment had been made, in the unappointed moiety of the trust funds. Vice-Chancellor Wood had decided that the period to be looked to in order to ascertain whether the eldest son was excluded was the death of Mr. Collingwood, the father, who took a life interest in the trust funds. At that time the entail had been barred, and E. Collingwood, the son, was only tenant for life of the North Dissington estates. The fact that this was the result of the respondent's own act could make no difference, and he declared E. Collingwood to be entitled to an equal share with his sister, Cecil Collingwood, in the unappointed moiety of the trust funds. Miss Cecil Collingwood now appealed from his Honour's decision. Edward Collingwood, the son, died soon after the decree above mentioned was made.

Sir R. Palmer and *Mr. Pearson* (with them *Mr. Francis Cates*) appeared for the appellant;

Mr. Nalder for the trustees; and

Mr. Jessel and *Mr. Martineau* for the respondents, the personal representatives of Edward Collingwood, the son.

Their Lordships now reversed the judgment of the Vice-Chancellor, and ordered the case to be remitted, with a declaration that the appellant was absolutely entitled to the whole of the appointed moiety of the trust-fund, and a direction that the costs of all parties should be paid out of her moiety.

Courts of Equity.

Lords Justices. March 13. — The British Equitable Insurance Company *v.* The Great Western Railway Company.

Life Insurance—Concealment by Assured of Material Facts—Voidance of Policy.

This was an appeal by the defendant company from a decree of V. C. Malins, directing that a policy which had been effected in the office of the plaintiff company, on the life of one John Bird, and of which the defendant company were assignees for value, should be delivered up to be cancelled, on the ground that it was void *ab initio*, because of the concealment by the assured of material facts relating to his health at the time when the policy was effected. The case is reported 38 Law J. Rep. (N.S.) Chanc. 132.

Mr. J. Pearson and *Mr. Stevens* for the appellants.

Mr. Glasse, Mr. Shebbeare, and *Mr. Rowcliffe,* for the respondents, were not called upon.

Their Lordships dismissed the appeal with costs.

Lord Romilly, M.R. March 11. — *In re* Tuck.

Solicitor and Client—Cestui que Trust—Common Order to Tax—Waiver of Irregularity.

The trustees of the marriage settlement of Mr. and Mrs. Bryant employed Mr. Tuck as their solicitor in the matters of their trust. The interest which Mrs. Bryant took under the settlement was given to her separate use, and Mr. Bryant took no interest at all. Mr. Tuck, however, sent in his bill of costs (which extended only to business done for the trustees since the marriage) to Mr. Bryant. A common order to tax was then obtained by Mr. and Mrs. Bryant, as if they had been immediately liable to pay the bill. It appeared that neither Mr. Cocker, the solicitor now acting for Mr. and Mrs. Bryant, nor Mr. Tuck, knew that this order was under the circumstances irregular; but when Mr. Tuck, on attending the taxation, found that the form of the order precluded him from supporting certain items, on the ground of the express instructions of the trustees, he discovered and raised the objection, at the same time offering to proceed if a proper order was obtained. Mr. Cocker, however, insisted on proceeding under the common order, and Mr. Tuck now moved to discharge it.

Mr. Jessel and *Mr. Lindley* for Mr. Tuck.

Mr. Waller, for Mr. and Mrs. Bryant, admitted that the order was irregular, but contended that Mr. Tuck had by his conduct waived the objection.

The Master of the Rolls held that the objection had not been waived. His Lordship distinguished the case from *Re Wavell,* 22 Bea. 634, on the ground that there the waiver was complete; but in this case the objection was taken as soon as Mr. Tuck found out what the effect of the order would be—that he would have to bear the costs of the taxation, and then bring an action against the trustees. The order was therefore discharged.

Stuart, V.C. March 8. — Fallows *v.* Slatter.

County Court—Appeal—Plaint Charging Defendant and his Solicitor, a Co-defendant, with Fraud—The Solicitor not a Proper Party to the Suit—Decree and Order of the County Court reversed as against him.

This was an appeal by a Mr. Coote, a solicitor, from a decree, and an order on further consideration, made against him in the suit by the judge of the Huntingdon County Court.

The appeal case, as settled for the decision of this Court, was so drawn as, instead of distinctly stating the facts of the case, to leave them to be inferred only from the allegations in it, and then submitted twelve questions to the Court.

The facts of the case were very shortly these:—

Slatter, who carried on business at Coventry, gave the plaintiffs a bill of sale of his stock in trade and furniture at Coventry, to secure a sum of 1,014*l.* 10*s.* 6*d.*, and the bill of sale extended to after-acquired stock. The plaintiffs realised their security; sold Slatter's stock and some of his furniture at Coventry, having the power of selling the whole if they had chosen to do so; and paid themselves nearly all that was due to them from Slatter. Slatter afterwards removed, with his unsold furniture, to St. Ive's, where he purchased new stock in trade, and again set up in business. To St. Ive's the plaintiffs followed Slatter, and endeavoured to get possession, under their bill of sale, of his after-acquired stock, in full satisfaction of their original debt, on which there was then about 250*l.* remaining due. The plaintiffs acted on the advice of a solicitor named Wright. Slatter consulted Coote in the matter. Coote, as solicitor for him, advised him that the real actor in the plaintiff's proceedings was Wright, for purposes of his own; and that he, Coote, believed the plaintiff's claim against Slatter had been legally, or in fact fully, satisfied by the first execution. He therefore advised Slatter to resist their attempts to get possession of his property. He did so; and each party in turn put bailiffs in possession of the disputed chattels. After some time, and considerable contention, Slatter put up the property for sale, on his own account; whereupon the plaintiffs filed the plaint in this case against him, against Coote his solicitor, and against other parties, including the auctioneer, to restrain the sale, and for an account of any money received from the property by Slatter, Coote, and the other defendants. The plaint contained most serious charges against Coote; but it was, after a short time, dismissed as against the auctioneer.

The plaint was filed on April 13, 1867; and on that day, upon very insufficient evidence, an *ex parte* injunction was granted. Coote afterwards put in a statement in answer to the plaint. At the hearing of it, on January 28, 1868, a decree was made. The registrar then made his certificate in the cause, to which Coote filed fifteen exceptions. By an order made on further consideration, in July 1868, Coote was ordered to pay 30*l.* into Court. Coote then presented this appeal, on the ground that he had been improperly made a party to the suit in the first instance, and could not therefore be bound by any of the proceedings in it.

Mr. H. F. Bristowe appeared for Mr. Coote, and submitted that nothing was due from him to the plaintiffs, and that he was clearly not a proper party to the suit any more than the auctioneer was, against whom the plaint had been dismissed as of course.

Mr. Horsey, for the plaintiffs, contended that Coote was in possession of property, with notice of the plaintiffs' claim upon it; that the sale which he and Slatter were going to effect was therefore in the nature of a fraud on the plaintiffs. No solicitor could 'collude' with his client in a fraud; and if he attempted to do so, it was clearly the duty of the Court to restrain him. Then as to this appeal. Every such appeal must be brought, on due notice, within thirty days after the decree appealed from. Here the decree was pronounced so long ago as January 1868.

Mr. H. F. Bristowe said the appeal was from the order of July 1868, on due notice, and that the County Court judge had considered, when he made that order, that the whole case was then open to him.

Mr. J. W. Chitty was for Slatter.

Stuart, V.C., after stating the facts of the case, and commenting on the irregular form of the pleadings, said there was enough in the case to show that it was an appeal from all the proceedings in the Court below. The case was one that ought not to have been instituted in the County Court at all. Mr. Coote was clearly not a proper party to it. The original decree, and the order on further consideration, must be reversed as to Coote; but as he, a professional man, ought to have known he was not a proper party to the suit, and should, in the early stages of it, have got his name removed from the record, the plaintiffs must pay him only his costs up to and including the decree of January 1868. He would not, however, be made to pay any costs.

Stuart, V.C.
March 9. } Wright *v.* Tanner.

Partnership—Dissolution, Suit for—Infant Partner, Decree by Consent on Behalf of—Motion to Stay Proceedings against—Further Consideration—Infant not Liable for Losses of the Concern.

This was a suit for a dissolution of a partnership for the manufacture of diphosphate of lime, which had been entered into between the plaintiffs and the defendants in the suit. By the partnership agreement, which was dated July 17, 1867, and made between the parties in this suit, the capital of the concern was to be provided thus:—10,000*l.* in the first instance, of which Wright was to furnish 5,000*l.*, John Willis Pountney 2,500*l.*, J. T. Coling 2,500*l.*, and any additional capital was to be contributed by any partner, but preference was then to be given to the one who had not already contributed, or who had contributed the least. Tanner was to be paid 500*l.* a year, and the remaining partner, Way, 250*l.*, for his services. Wright was, moreover, to receive a salary of 250*l.* a year, and John Willis Pountney 150*l.* a year. At the date of the contract, John Willis Pountney was an infant, a fact which the plaintiff alleged by his bill that he did not discover till long afterwards. The partnership business was not successful, and resulted in considerable losses. This bill was then filed, and John Willis Pountney being still an infant, a guardian *ad litem* was appointed for him, who, on his behalf, consented to a decree for dissolution. J. W. Pountney was now of age. A few months before he attained twenty-one he made an affidavit, by which he stated that he was willing to abide by the partnership articles, and would do so after attaining twenty-one. He had, however, since been induced to think that the failure of the concern was caused by the mismanagement of Wright; and he submitted that he was, notwithstanding his offer by the affidavit, not bound to contribute to the losses of the business. It appeared that he had received some of his salary, but had not paid the 2,500*l.* stipulated for; and the chief clerk, in taking the account under the decree, had certified that that item—considered as an asset of the partnership—was 'irrecoverable.' He had also certified that a sum of 90*l.* odd was payable to J. W. Pountney.

The cause came on some time since, upon a summons to vary the certificate as to the 90*l.*, and on further consideration, when it was arranged that as the allowance of that sum was so connected with the liability of J. W. Pountney to the concern, that the better course

would be for him to move in the cause to stay all further proceedings in it as against him. Accordingly,

Mr. Bagshawe now appeared for J. W. Pountney, and supported that motion, contending that on the facts as above stated he was not liable to the losses of the concern, and therefore ought to be relieved from the suit.

Mr. J. N. Higgins, for the plaintiff, characterised the case as one that appeared to be tinged with fraud. There was no doubt an infant could in such a case bind himself. He also denied the alleged mismanagement of the plaintiff.

Mr. Whitehouse, for other parties, supported the plaintiff's case.

STUART, V.C., refused the motion to stay the proceedings against Mr. J. W. Pountney; but upon the further consideration of the cause, and upon Mr. J. W. Pountney disclaiming all interest in the partnership assets, and relinquishing any further claim to his salary, made a declaration that he was not liable to contribute to the losses of the concern, and apportioned these losses according to the provisions of the partnership articles.

MALINS, V.C. March 3. } BULMER *v.* HUNTER.

Ante-nuptial Settlement, Voidance of—Fraud of Husband and Wife.

On February 12, 1867, the defendant Robert Hunter received notice of trial in respect of an action commenced against him by the plaintiff for the recovery of 150*l.* and certain interest due to the plaintiff upon the defendant's promissory note. On February 15 Hunter, in consideration of his then intended marriage with Sarah Pounder, settled the whole of his property upon trust for her for life, and afterwards for his son by a previous marriage. The marriage was solemnised on February 18. Verdict was given for the plaintiff in the action on March 1. Hunter having shortly afterwards become bankrupt, the plaintiff filed the present bill to set aside the settlement as fraudulent. It appeared that Hunter and Sarah Pounder had cohabited together as man and wife from 1856 up to the time of their marriage.

Mr. Bagshawe for the plaintiff.

Mr. C. Herbert Smith for the defendants.

MALINS, V.C., held that the consideration of marriage failed, the intention of the settlor obviously being to defraud his creditor, and the intended wife being cognisant of the circumstances and therefore implicated in the fraud. The settlement must be declared void to the extent of the plaintiff's claim.

MALINS, V.C. Feb. 12, March 5. } STUART *v.* COCKERELL.

Will, Construction of—Remoteness.

Testatrix, dying in 1785, by her will gave all her property upon trust to convert and pay the income to Sir Simeon Stuart for life, and after his decease to his eldest son (then unborn) for life, and after his decease to Elizabeth Stuart for life, and 'after the decease of the survivor of them the said Sir Simeon Stuart, his eldest son, and Elizabeth Stuart,' then upon trust to pay and transfer the fund unto all the children of the said Sir Simeon Stuart, share and share alike if more than one, and the child or children of such as should be dead. Sir Simeon Stuart died in 1816. His eldest son, born in 1790, died in 1868, leaving issue. Elizabeth Stuart died in 1846.

Mr. Cotton and *Mr. Riddell*, for the petitioner, the only surviving son of Sir Simeon, claimed half of the fund.

Mr. Shapter, *Mr. Woodroffe*, *Mr. Fleming*, *Mr. Wickens*, and *Mr. Cotterell* for other claimants.

MALINS, V.C., held that the limitation over to the children and grandchildren of Sir Simeon Stuart, being a gift to a class to be ascertained after the expiration of a life not in being at the death of the testatrix, was void for remoteness. The next of kin of the testatrix were therefore entitled.

MALINS, V.C. March 9, 10. } APPLETON *v.* ROWLEY.

Tenancy by Curtesy in Lands settled to Wife's Separate Use.

An important question arose upon the further consideration of this case as to the right of the plaintiff Robert Appleton and another to hold by curtesy certain freeholds, of which their respective wives had died equitably seised in fee to their separate use, under the will of Samuel Duffield, the testator in the cause.

Mr. Bazalgette, *Mr. J. Pearson*, *Mr. C. Hall*, *Mr. Whitehorne*, *Mr. W. Pearson*, *Mr. Humphrey*, *Mr. Langley*, *Mr. Horsey*, and *Mr. Grenside* appeared for various parties interested in the suit.

MALINS, V.C., decided in favour of the curtesy.

MALINS, V.C. March 12. } PEATFIELD *v.* BARLOW.

Costs—Set-off—Country Solicitors and London Agents.

By the decree made in this cause in June 1867, the costs of the defendant Barlow and another were ordered to be paid out of a fund in Court to Messrs. Few & Co. as the London agents for Barlow's solicitor, Mr. Esam, of East Retford. These costs were never paid to Messrs. Few; but in June 1868, at which time Esam executed a deed for the benefit of his creditors, there was a sum of 228*l.* 4*s.* 8*d.* in his hands standing to the credit of Barlow's account.

This sum (being in excess of the amount of his costs in the suit), Barlow directed to be applied and set off in payment of such costs. Barlow now petitioned that the amount of costs so accounted for by him to Esam might be apportioned out of the fund in Court and paid over to him.

Mr. Schomberg, for the petition, admitting that one of two innocent parties must suffer, argued that the payment to Esam by way of set-off was sufficient satisfaction of the costs under the order, and that Barlow was entitled to be recouped out of the fund in Court. He relied on *Waller* v. *Holmes*, 1 J. & H. 230, s. c., 30 Law J. Rep. (N.S.) 24.

Mr. J. Pearson and *Mr. Bardswell*, for Messrs. Few, contended—(1) that the order of June 1867 was express notice to Barlow that the costs were to be paid into the hands of the partners Few, and not to Mr. Esam; (2) that the petitioner could not now come and ask the Court in effect to vary the terms of that order.

MALINS, V.C., held that the order contained in the decree was merely a direction to pay the costs to Messrs. Few as agents for Esam; that there was no privity between Messrs. Few and the petitioner; and that the London firm, as Esam's agents, could have no better

claim than their principal, nor any independent right against Barlow. The petitioner clearly had the right at any time to direct the application of his money in Esam's hands in payment of what was due for his costs in the suit, and the act of bankruptcy did not affect that right. The costs must, therefore, be deemed to have been satisfied to the extent of the sum set off, and the prayer of the petition must be allowed.

MALINS, V.C. March 11. } WESTON *v.* COHEN.

Attachment—Further Time for Answering, Day from which it runs—Form of Order.

This was a motion to discharge an attachment which had been issued against the defendant under the following circumstances:—The plaintiff's interrogatories were served on January 8, 1869; the defendant's time for answering would have expired on February 5; on February 1 defendant obtained the usual order 'for four weeks further time'; on March 2, the answer not having been put in, a summons was taken out and the attachment issued, the plaintiff alleging that the further time allowed by the order of February 1 expired on March 1, and that the defendant was in default.

Mr. Bush, for the motion, argued that the extension of time for four weeks must mean four weeks from the expiration of the time to which the defendant was already entitled—that is to say, from February 5 to March 5; the attachment therefore was improper, and, in any view of the case, a harsh and extreme proceeding.

Mr. Shapter and *Mr. Bilton*, for the plaintiff, contra.

MALINS, V.C., thought that, strictly speaking, the additional time expired on March 1, four weeks from the date of the order; but as the terms of the order were ambiguous, he should discharge the attachment and allow no costs on either side. He should direct his chief clerk for the future to specify in these orders the day from which time was to run or the day on which it would expire.

JAMES, V.C. March 6. } HALDANE *v.* ECKFORD.

Practice—Production of Documents—Party requiring in Contempt.

Adjourned summons taken out by the defendant for the production of documents by the plaintiff in aid of the defendant's case in an inquiry at Chambers directed by the decree in the suit, as to the domicile and next of kin of the testator. The defendant was in contempt by reason of his disobedience of an order of the Court directing him to execute certain powers of attorney, and he was out of the jurisdiction in Jersey. The question was whether, being thus in contempt, he could obtain the production of documents before he had purged his contempt.

Mr. Eddis supported the application.

Mr. Amphlett and *Mr. Crossley* opposed it.

JAMES, V.C., said it was the plaintiff's decree, and he who was proceeding with the inquiry. It could not be said that because a man was in contempt therefore he could not have the production of documents necessary to his case. Plaintiff could not go on and yet preclude the defendant from obtaining evidence. He must grant the application, but defendant must make an affidavit as to the documents in his possession seven days after plaintiff's affidavit, and produce such documents seven days after plaintiff's production.

JAMES, V.C. March 6. } *In re* THE LONDON AND COLONIAL CO. (LIMITED).

Company—Winding-up—Agent Abroad—Contributory—Payments on Account of Shares provided for by Special Agreement—Cross Claims.

In October 1865 Robert Colvin Clark went to Melbourne, in Australia, to act there as agent of the above-mentioned company, under an agreement dated Sept. 30, by which Clark was to act as the company's agent at Melbourne for five years, at a salary of 750*l.* per annum, and in addition was to be allowed a commission on remittances, and to act as an independent merchant. Clark also having, under his arrangement with the company, taken 50 shares of 100*l.* each in the company, on each of which he had paid 2*l.* out of 10*l.* to be paid per share, the company agreed to place the balance of 8*l.* per share, and all other sums which might become due on such shares on account of calls, to Clark's debit; and the company also thereby agreed that if from illness or otherwise Clark's connection with the company should cease, they would pay the return passage of himself and wife to England. In 1867 a voluntary winding-up of the company was commenced, which, by order of the Court dated March 6, 1867, was continued under supervision.

In January 1868 Clark's services, which had continued after the winding-up, were abruptly put an end to by Martin, the attorney of the official liquidators in Australia. Thereupon, to obtain a settlement of his claims against the company, Clark took proceedings against the company at Melbourne, under which, by arrangement, a sum of 4,000*l.* was reserved to meet his said claims, of which sum 1,000*l.* was given to him to enable him to return to England. Clark's claims against the liquidators for salary and allowances under the agreement of the company now came before this Court to be decided upon a motion by the liquidators to restrain his proceedings at Melbourne, a summons taken out by them for an order against him for the payment of a call of 20*l.* on his shares, and a cross summons by Clark in effect claiming to have his agreement with the company carried out specifically.

Mr. Druce and *Mr. Charles Hall* were for the official liquidators.

Mr. Kay and *Mr. J. N. Higgins* for Clark.

JAMES, V.C., said unless the agreement were rescinded both parties must act according to it. Under it Clark had a lien on the remittances which came into his hands, and to that extent he had a security for anything due to him under the arrangement. The 1,000*l.* claim of the liquidators for calls against him could not be enforced. The proceedings at Melbourne must be stayed, and the 3,000*l.* there transferred to this country and paid into Court to the account of the money to be deposited under the agreement. Costs out of the estate.

JAMES, V.C. March 6. } HALL *v.* HARGREAVES.

Mining Partnership—Renewal of Licence to Work Mine—Constructive Trust—Production of Documents.

Adjourned summons. Previously to March 25, 1867, the plaintiff and the two defendants were co-partners

at will in working certain collieries in Lancashire, under a licence to the partnership from the Duke of Buccleuch, which expired at the date above mentioned. On March 23 the defendants gave the plaintiff notice to determine their partnership with him on March 25. The plaintiff then endeavoured to obtain from the Duke a renewal of the lease of the collieries to himself. Thereupon the defendants applied for and obtained a renewal of the lease to themselves, and they continued working the colliery, using for that purpose the plant and stock in trade of the partnership, which they had taken at a valuation made by their own valuer, the plaintiff having refused to appoint any valuer to join in taking such a valuation. The plaintiff by his bill prayed for accounts of the partnership dealings, and a declaration that the new lease and all profits made thereunder were partnership assets. Under the usual order to produce documents, the defendants objected by their affidavit to produce the books of account and papers relating to the business of the collieries subsequent to March 25, 1867. The plaintiff took out this summons to consider the sufficiency of the defendants' affidavit, and their objection to produce certain plans and drawings relating to the said collieries.

Sir R. Palmer, *Mr. Kay*, and *Mr. Bedwell* supported the application.

Mr. Little, *Mr. John Pearson*, and *Mr. Lindley* opposed it.

James, V.C., said that the plaintiff was entitled to the production of the working plans of the collieries. He had made out sufficient common interest with the defendants, who had continued the business with the assets of the old partnership. *Prima facie* the profits would belong to all the partners, and the plaintiff was entitled also to the production of the accounts.

James, V.C. March 8, 9. } *In re* Burrell. Burrell *v.* Smith.

Mortgagor and Mortgagee—Effect of Disclaimer in a Foreclosure Suit, on the Mortgagee's Right to Prove—Sub-Mortgage—Leasehold Estate Forfeited to Lessor—Foreclosure.

Adjourned summons. Burrell was indebted to Deakin in 3,000*l.*, secured by a mortgage of certain leasehold premises. Deakin mortgaged this debt to Eyton to secure 1,200*l.*, and by indenture he made a sub-lease to Eyton of the leasehold premises for the residue of the term, less 3 days. Notice of this sub-mortgage was given to Burrell. Subsequently Burrell died in 1863, and in a suit to administer his estate Deakin and Eyton jointly brought in a claim for the 3,000*l.* debt, supported by the usual affidavit, and so far allowed. Deakin shortly afterwards made a second mortgage of the said 3,000*l.* mortgage, and his security on the said leasehold premises, to the Liverpool Loan Company. Burrell's executors then sold their equity of redemption to Deakin, who afterwards executed an assignment to Rigby and Millington for the benefit of his creditors. In June 1867, Eyton instituted in the Palatine Court a suit against Rigby and Millington and the Liverpool Society; in that suit Rigby and Millington disclaimed by their answer all interest in the mortgage debt and premises. A decree for foreclosure was made against the Liverpool Company, and an account was ordered of what was due to Eyton on his sub-mortgage. The foreclosure was then made absolute against the Liverpool Company. In consequence of non-payment of the rent of the leasehold premises the landlord afterwards entered upon them, and thus the security for the 3,000*l.* mortgage was gone. The question on this summons was whether the claim made in 1863 by Deakin and Eyton was to be paid as a debt proved against Burrell's estate, or whether the decree for foreclosure had determined Eyton's right.

Mr. Druce and *Mr. F. H. Colt*, for Eyton, supported the application.

Mr. Kay and *Mr. Cozens Hardy*, for the plaintiff, opposed it, and in the course of their argument contended that the effect of the disclaimer was to pass the whole estate, being equivalent to a fine, as a conveyance by record.

Mr. Boyle appeared for Burrell's executors.

James, V.C., said the applicant was a creditor, and had never been paid. The foreclosure decree did not in any way determine his right to be paid. The fact that the estate on which the debt was secured had been taken by the landlord, who claimed by a title paramount, did not make the applicant in default, for he was not bound to pay the rent or keep the covenants under the lease. His possession was precisely the same as if the estate on which his mortgage was secured had been swept away by flood or fire. He was still entitled to receive out of the 3,000*l.* what was due in respect of his sub-mortgage, interest, and costs, and his proof against Burrell's estate must be allowed to that extent.

James, V.C. March 11. } Turnbull *v.* Garden.

Principal and Agent—Account—Agent charged with Discount allowed to him.

The plaintiff was a widow who for some time resided in India, and while she was there the defendant was employed by her as an agent to receive money payable to her in this country, and to make payments on her account. In 1865 the plaintiff authorised the defendant to supply her son with a reasonable outfit as a cornet proceeding to India. Defendant supplied an outfit, and in making out his account against the plaintiff he charged her with money as paid for certain articles, whereas in fact a part only of the sums so charged were paid to the tradesmen who supplied the articles, the rest being returned or allowed to the defendant according to what the defendant alleged was the usual custom of army agents. The plaintiff also alleged that many of the articles supplied to her son wholly exceeded the limits of a reasonable outfit.

The defendant had issued a foreign attachment in the Lord Mayor's Court against the plaintiff, attaching her balance at the London and Westminster Bank; to answer a debt of 93*l.*, which he claimed as due to him on balance of accounts and the plaintiff thereupon filed a bill against the defendant for a general account, and for an injunction against the defendant proceeding with the action commenced by him in the Lord Mayor's Court.

Mr. Druce and *Mr. Graham Hastings* for the plaintiff.

Mr. Kay and *Mr. Blackmore* for the defendant.

James, V.C., said that as to the discounts allowed to the defendant, and not by him allowed to the plaintiff, the defendant had made a case that he charged the plaintiff with the ordinary prices at which the tradesmen supplied the articles to the general public, although by arrangement with the tradesmen he paid them something under those prices. But this was not the case disclosed by the evidence, for it appeared that in the

case of a rifle the ordinary price was 86*l.*; but that the tradesmen on being informed that the defendant would expect to be allowed a discount, raised his price to 113*l.*, in order that after discount was taken off he might get his usual price. There were other cases of this kind, and they constituted a clear transgression of the rule, that a fiduciary agent should not make a secret profit at the expense of his principal. To allege the custom of the trade was futile. His Honour remembered a case in which the defendant, a buyer and seller of flour on commission, alleged a custom in his business for commission agents to mix the flour, which they bought on account of their principals, with inferior flour, and to charge their principals with the price of the best flour for the mixture. But customs of this kind would never stand in a Court of equity. There must be a decree for an account, and in taking it the defendant must be charged with all discounts received by or allowed to him, and there must be an inquiry how much of the expenses of the outfit ought to be disallowed, having regard to the authority given to the defendant in respect of it, and any subsequent ratifications. So far as this part of the case was concerned defendant to pay the costs.

Probate and Matrimonial Causes.

Divorce and Matrimonial Causes. Feb. 16, March 2. } Ross *v.* Ross.

Judicial Separation—Wife Petitioner—Adultery—Order to Attend at Hearing—Practice.

This was the wife's petition for judicial separation by reason of the husband's adultery. The respondent pleaded connivance. The Court had ordered that the petition should be heard before itself without a jury.

Dr. Deane, for the respondent, moved for an order that the petitioner should attend at the hearing to be examined.

Pritchard, for the respondent, contra; section 43 of the 20 & 21 Vict. c. 85 only applied to suits for dissolution of marriage.

The Judge Ordinary.—The Court in almost all cases requires the petitioner to be here. It will not make an order that she shall be examined, but that she shall be here when the petition comes on for hearing.

Order accordingly.

Divorce and Matrimonial Causes. Feb. 16, March 2. } Shelton *v.* Shelton and Campbell.

Time for Making Decree Absolute—29 & 30 Vict. c. 32 s. 3—Refusal of Court to Exercise Discretion.

On February 6 the husband obtained a decree *nisi* for dissolution of the marriage on the ground of the wife's adultery. Neither the respondent nor co-respondent appeared at the hearing, and the petitioner, an officer in the Indian army, was prevented by ill-health and service abroad from bringing his petition earlier before the Court.

Inderwick moved the Court to exercise its discretion under section 3 of the 29 & 30 Vict. c. 32, and to fix a less period than six months, within which the decree might be made absolute. There was no appeal, and if the decree were drawn in the usual form, it could not be made absolute until after the long vacation. The petitioner was still in ill-health, and suffered from the excitement consequent on the suit.

The Judge Ordinary declined, in the absence of special circumstances, to depart from the ordinary practice, and refused the application.

Divorce and Matrimonial Causes. March 2. } B. *v.* L. falsely called B.

Nullity—Order for Examination—Refusal by Respondent—Attachment—Practice.

This was a suit for nullity promoted by the husband. The usual order for examination by medical inspectors was made and personally served upon the respondent, but she, while admitting the truth of the allegations in the petition, refused to submit to examination.

Dr. Spinks (with him *Bayford*), for the petitioner, moved that an attachment might issue against the respondent for non-compliance with the order of the Court—the attachment to lie in the registry for the present, but to be enforced if the respondent attempted to remove from the jurisdiction.

The Judge-Ordinary.—The best course will be to let the motion stand over. If at the hearing the Court determines that she ought to be examined, it will make a fresh order for the purpose; but in the meantime, if she attempts to leave the jurisdiction, the Court will grant the attachment.

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Will—Construction—General Bequest of Personalty.

Captain Charles Dutton by his will, dated March 24, 1864, after directing all his just debts and funeral and testamentary expenses to be duly paid and satisfied by his executors, bequeathed as follows:—'I give and bequeath all and every my household furniture, linen, and wearing apparel, books, plate, china, pictures, horses, carts, and carriages, and also every sum and sums of money which may be found in my house, or be about my person, or due to me at the time of my decease, and also all my stocks, funds, and securities for money, money due on bonds, bills, notes, or other securities of which I may die seised, possessed of, or entitled to, and of every kind and description whatsoever, my will and intention is that my said executors, hereinafter named, and the survivor of them, do and shall pay the same to my present housekeeper, Martha Herbert, to and for her own sole and separate use and benefit absolutely. Also I give and bequeath to my servant, Mary Groves, the legacy or sum of nineteen guineas. I also give and bequeath to Frederick Harrison and John Furtado the sum of five guineas each for the purchase of a ring'; and he appointed them executors.

The question was whether under the words of the will certain bank shares and railway shares, and also a sum of money arising from the estate of a deceased brother, and now in the hands of his administrator, passed to the legatee. V.C. STUART held that there was a sufficient indication of intention in the will to pass the general personal estate to the legatee, and upon appeal by some of the next of kin

The LORDS JUSTICES affirmed the decision with costs.

Mr. Kay and *Mr. W. R. Ellis* were counsel for the appellants.

Mr. Joshua Williams, *Mr. Solomon*, and *Mr. Mander*, who appeared for the various respondents, were not called upon.

STUART, V.C. March 20. } CHEESWRIGHT *v.* THORN.

Practice—Plaint in County Court—Appeal, Stay of Proceedings pending—County Court Orders, 1867, *Order* 19, *Rule* 3.

Mr. Dauney moved to stay proceedings in a County Court plaint in Equity pending an appeal against the decree. The application was made under the 'rules, orders, and forms for regulating the practice of the County Courts, 1867,' Order 19, Rule 3, which is in the following terms: 'Proceedings not to be stayed unless Vice-Chancellor or Judge otherwise direct. The

pendency of an appeal shall not operate as a stay of proceedings; but the Vice-Chancellor to whom such appeal is made, or the Judge from whose decree or order the appeal is made, may stay the proceedings pending the appeal, on such terms as to giving security or otherwise as to such Vice-Chancellor or Judge may seem fit.'

Mr. T. Hughes objected that, under Rule 12 of the Consolidated Orders of the Court of Chancery, every application to stay proceedings under a decree should be made first to the judge who pronounced the decree.

Stuart, V.C., considered that it was not necessary to apply first to the County Court judge to stay his own decree, and that the General Orders of the Court of Chancery did not apply to proceedings in the County Courts. As the appeal appeared to be a *bona fide* one, and it was not shown that the plaintiff would be damnified by staying the proceedings pending the appeal, he should allow the motion, reserving the costs till the hearing of the appeal.

Malins, V.C. March 18. } Crowe *v.* Nesbitt.

Practice—Dismissal for Want of Prosecution—Death of Co-plaintiff.

Mr. Fitzroy Kelly moved to dismiss the bill in this suit for want of prosecution. One of the co-plaintiffs was dead; the other had settled out of Court with all the defendants other than the defendant now moving; there had been no order of revivor; the surviving plaintiff consented to the present motion, but did not appear upon it. Under these circumstances the Court was asked to make a common order of dismissal, without requiring the surviving plaintiff to revive, or that in default the suit should stand dismissed.

The Vice-Chancellor made the common order of dismissal; costs of the suit to be paid by the surviving plaintiff.

Malins, V.C. March 18. } Webster *v.* Robinson.

Practice—Affidavit of Documents—Motion.

In this suit the defendant had made the usual affidavit of documents upon summons in Chambers. The plaintiff not being satisfied therewith, gave notice of motion for a further affidavit. On the day before the motion came on, defendant had made a further and sufficient affidavit.

Mr. Glasse, for plaintiff, now moved for his costs of the motion.

Mr. Peck, for defendant, objected that the proceeding ought to have been by summons in Chambers, referring to Morgan's Chanc. Acts and Orders, 174, and *Lazams v. Mozley*, 5 Jur. N.S. 119.

The Vice-Chancellor gave the plaintiff only such costs of the motion as would have been given had the matter been heard in Chambers.

Malins, V.C. March 19, 20. } *In re* Joint-Stock Coal Company. *Ex parte* Green. *Ex parte* Copeman.

Winding-up Petition—Meeting of Shareholders—25 & 26 Vict. c. 89, s. 79—Second Petition, Costs of.

Two petitions for the winding-up of this company, which was established in 1864 for the supply of coals upon the 'co-operative' principle.

Mr. Cotton and *Mr. Higgins* for first petitioners.

Mr. E. K. Karslake and *Mr. Chitty* for second.

Mr. Glasse and *Mr. Roberts* for the company.

Mr. Bardswell for a shareholder in support of petitions.

The Vice-Chancellor said that he found the losses of the company had been continuous from its foundation in 1864 up to the re-formation of the board of directors in 1868; nevertheless, the balance-sheet of December 1868, the accuracy of which was not impugned, showed the available assets to be 14,000*l.*, while the debts amounted only to 8,000*l.* The company had certainly not, up to the present time, been profitable; but His Honour could not, since the decision *In re Suburban Hotel Company*, 36 Law J. Rep. (N.S.) Chanc. 710, regard this circumstance alone as sufficient to make it, 'in the opinion of the Court, just and equitable that the company should be wound up.' In fact, none of the grounds specified in 25 & 26 Vict. c. 89, s. 79, existed for winding-up this company. But failing this the petitioners had asked for subordinate relief in the shape of an order directing a meeting of the shareholders to be convened with a view to the winding-up of the company. Upon this point His Honour desired to lay down the rule that where the Court was satisfied upon the evidence that there was no case made out for the compulsory winding-up of a company under section 79, no order could be made without consent for a meeting of the shareholders, there being in such cases no ground for the intervention of the Court. With regard to the second petition, presented in behalf of certain shareholders at Norwich, His Honour admitted that, in some respects, it was distinguishable from the first upon the merits, but he could make no order upon it; and, having regard to the fact that one winding-up petition had already been presented, he thought the parties were not justified in presenting a second for the same object. Both petitions, therefore, must be dismissed with costs.

Malins, V.C. March 20, 22. } *In re* Mercantile Trading Company. Stringer's Case.

Company — Winding-up — Creditor's Claim — Dividend Paid out of Capital—Summary Jurisdiction of Court—25 & 26 Vict. c. 89, ss. 101, 165.

This was a summons by the official liquidator in the winding-up of the above company, calling upon Mr. Stringer to repay certain dividends, amounting to 25 per cent., alleged to have been improperly declared and received by him in respect of his shares, and a further sum of about 400*l.* alleged to have been improperly paid to him as a director's commission on profits.

The company was formed in June 1863, for the purpose of running the blockade of the Confederate States, under a contract with the *de facto* Government of that country, for a joint adventure—the company to find ships, the Government to pay two-thirds of all losses incurred in the blockade-running, and supply cotton at 6*d.* per lb., to be delivered at a port in the Southern States.

By the articles of the company no dividend was to be paid except out of 'profits in hand.' In February 1864 a balance sheet was prepared, exhibiting a profit of 42,000*l.*; this, however, was made up by crediting themselves with two-thirds of the value of the ships payable under the Confederate guarantee, the greater part of

which was never realised, and also with a large amount of cotton which was ultimately destroyed in the Confederate ports. Upon the balance of estimated profits thus made up, the company obtained from the Agra & Masterman's Bank advances to the amount of about 21,000*l.* upon a special account called the 'dividend account.' A dividend of 25 per cent. was shortly afterwards declared and paid to the shareholders.

On the collapse of the Confederate Government the company failed, and, upon taking the accounts, was found to have lost all its capital, with a further sum of about 50,000*l.*

The bank, as creditors in the winding-up, now applied through the official liquidator, under the Companies Act, 25 & 26 Vict. c. 89, ss. 101 & 105, for repayment of all dividends, &c. received by the shareholders, on the ground that such dividends had been improperly paid out of capital, and not out of profits actually in hand, as required by the Articles of Association.

Mr. Cotton and *Mr. Higgins* for the liquidator.

Mr. Glasse and *Mr. H. M. Jackson*, for Mr. Stringer, argued that the balance sheet was fairly made up and the dividend properly declared; but if not, the bank having, as shown by the evidence, had full notice of the hazardous trade in which the company was engaged, and also of the manner in which the profits were estimated, could not now question the propriety of the dividend. Moreover, the Court could not in this case exercise the summary jurisdiction provided by the above-mentioned sections of the Act.

Malins, V.C., had no doubt that the dividend had been improperly declared, and might be recovered under a proper proceeding for that purpose; but the Court had not jurisdiction to order the repayment upon a summary application under either section 101 or 165. The company, having themselves participated in the wrongful application of this money, could not through their liquidator set up a claim against themselves; nor could an individual director be made liable to the creditor in respect of an act done by the company at large.

James, V.C. March 16. { *In re* The Oxford and Canterbury Hall Company (Limited). *Ex parte* Morton.

Company—Winding-up—Calls Subsequent to Winding-up Order—Creditor Contributory—Composition Deed—Set-off—Companies Act 1862, *ss.* 74, 75, 77.

Adjourned summons. Morton was the holder of above 2,000 15*l.* shares in the above company, on each of which he had paid up 10 guineas. In April 1868 a call of 1*l.* per share was made. On May 7 an order was made for winding-up the company. On July 30 Morton executed an assignment to trustees for the benefit of his creditors, which was duly assented to by the requisite number of creditors and duly registered. On November 30 the official liquidator of the company obtained an order for the payment of the said 1*l.* call. On January 19, 1869, a further call of 2*l.* per share was made on the contributories of the company, and an order was obtained to enforce such call against Morton. The release in Morton's composition deed extended to future liabilities. Morton claimed that at the time of the company being wound up the company was indebted to him to the amount of over 8,000*l.* The amount of the calls against Morton considerably exceeded the amount of such claim. This summons was taken out by Morton to dispute the validity of the orders for the said calls against him personally.

Mr. Ince, in support of the application, argued that Morton, by the execution of his composition deed, was discharged from all personal liability in respect of these calls, which must be proved against the trustees of the deed.

Mr. Druce, for the official liquidator, did not oppose the contention that the liquidator should prove against the trustees, if that were possible; but he submitted to the Court the question whether calls made subsequently to the deed were provable under it. He further submitted that the execution of the deed of assignment placed Morton in the position of a bankrupt, so far that the debt due to him should be set off against the amount of the calls. Such a compromise would be a benefit to the estate of the company.

Mr. J. N. Higgins appeared for the trustees of the composition deed.

James, V.C., said there must be an affidavit that the proposed set-off would be a benefit to the company's estate. It was not clear why Morton had been brought before the Court to relieve himself from the liability to pay the calls, and he must have his costs. The order would be that on the trustees abandoning their claims against the official liquidator, and the official liquidator abandoning all calls against Morton's estate, all proceedings be stayed.

James, V.C. March 13, 16. } *Re* The London and Northern Insurance Corporation (Limited).

Joint-Stock Company—List of Contributories—Agreement for Amalgamation between Two Companies unconfirmed by One of them.

This was a summons to remove the applicants' names from the list of contributories in the above company.

The applicants had been shareholders and directors in the Life Investment Mortgage and Assurance Company, and the directors of this company and of the London and Northern agreed upon an amalgamation, and the agreement was duly confirmed by the former company in accordance with their articles of association. The articles of the London and Northern required that an amalgamation with another company should be confirmed by a general meeting, but the directors were empowered to purchase the business and assets of any other company either for a consideration in money or by the issue of shares. The agreement referred to provided that the London and Northern should purchase the business of the Life Investment Company; that the shares in the latter should be exchanged for shares in the former, and that seven of the directors of the latter should be directors of the former.

The agreement, although never confirmed by the London and Northern, had been to some extent acted upon, and the applicants' names had been entered on the share-register of the London and Northern, though not returned to the registrar of joint-stock companies, and share certificates had been made out in their favour. They had also attended some meetings of what purported to be an amalgamated board as directors of the Life Investment Company elected under the agreement.

Mr. Kay and *Mr. Bagshawe* for the summons.

Mr. Druce and *Mr. J. N. Higgins* contra.

James, V.C., held that the agreement contemplated an amalgamation of the two companies, not a mere purchase of the business of the Life Investment Company by the London and Northern, and therefore required confirmation by a general meeting of the latter company. As it was not confirmed, it and all that was done on the faith of its becoming binding was void. The applicants, therefore, were not properly on the list of contributories of the London and Northern, and their names must be removed.

Probate and Matrimonial Causes.

Divorce and Matrimonial Causes. March 2. } Topper *v.* Topper.

Dissolution of Marriage—Cruelty and Adultery—Condonation—Evidence—Practice.

This was the wife's petition for dissolution of marriage by reason of cruelty and adultery. The respondent traversed both charges. The case was heard before the Court itself, and judgment was reserved. Subsequently the petitioner applied to be allowed to give further evidence in support of the charge of cruelty.

Dr. Tristram for the petitioner.

Pritchard for the respondent.

March 2.—The Judge-Ordinary: I think the evidence in this case fails. The parties lived together nearly ten years. During that time the petitioner speaks of two or three occasions upon which the respondent used some violence to her. On no occasion is it established, in my judgment, that he did her any serious hurt. Her own evidence was not given in a manner to induce the Court to place implicit reliance on her statement; and the occasions of violence, few and comparatively slight as they were on her own showing, appear to the Court to have been exaggerated. The blow said to have been given with the muzzle of a gun is an instance of this. The struggle which went on at the time between the respondent and another man renders it very probable that the injury the petitioner received was the result of accident rather than design. These isolated acts, not accompanied with any general ill-treatment and of no very serious nature, do not establish a case of legal cruelty. But, further, the last act of cruelty imputed took place at Easter 1863, and the petitioner continued to cohabit with the respondent until February 1864, when she left him because she was jealous of a servant in the house. The cruelty, if any, was therefore condoned, and cannot now be relied upon unless revived by the subsequent adultery which has been charged. But here too I think the evidence fails. The respondent is living in a house in which there is only one other person—a maid-servant. He has been once seen to kiss this woman. Beyond that there is no evidence of adultery, except that the man who lives in the next house has heard voices apparently talking in the same room at night. On the other hand, a girl who was once there on a visit deposes to the fact that the servant slept in her own room, and that she never saw the respondent in that room, or the servant in the respondent's. It was proposed, after the case was closed and the Court had taken time to consider its decision, that the petitioner should be allowed to be called again, to give in evidence of further acts of cruelty calculated to take off the effect of the condonation. But on the trial she had been several times asked if the occurrence which took place at Easter 1863 was the last act of which she had to complain, to which she had uniformly answered in the affirmative. Moreover, on turning to the statement of cruelty in her petition, it will be seen that Easter 1863 is the latest date she gives. I think the proposed further evidence ought not to be received. And as the evidence on neither of the two charges is, in my opinion, sufficient to sustain them, the petition must be dismissed.

Probate. March 16. } *In the goods of* C. Stewart.

Administration—Insolvent Estate—Grant ad colligenda to Creditor—Practice.

Charles Stewart, late of Kingston-upon-Hull, timber merchant, died intestate on January 18, 1869, leaving his widow and several children, some of whom lived abroad, him surviving. The estate, which consisted principally of deals and a number of small trade debts, was valued at 2,000*l.*, but the deceased was indebted to his banker and other creditors to the extent of 7,000*l.* The widow and the next of kin in this country renounced administration.

Dr. Tristram moved for letters *ad colligenda bona* to Mr. Pease, a creditor. Unless at once realised the property would deteriorate in value; it was also subject to charges, and the debts, if not promptly collected, would be lost. If the next of kin abroad also renounced, the applicant would be willing to take the usual grant of administration (*In the goods of Clarkington*, Sw. & Jr. 382).

Sir J. P. Wilde.—I think the grant may go, but you must pay the money into the registry, after deducting for wages and charges on the property; and you must also at once cite the remaining next of kin, with the view of taking a creditor's administration.

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Courts of Equity.

Lord Hatherley, L.C. March 17. } Charlton *v.* The Earl of Durham.

Executors—Trust Moneys—Receipt of One.

This was an appeal from a decree of Vice-Chancellor James, dismissing the plaintiff's bill with costs, reported *ante* p. 18.

Mr. Kay and *Mr. Haddan* for the appellants.

Mr. Druce and *Mr. Chitty*, for the respondents, were not called upon.

The Lord Chancellor dismissed the appeal with costs.

Lords Justices. March 19. } Jones *v.* Kilshaw.

Palatine Court of the Duchy of Lancaster—Appeal—Rehearing—17 & 18 *Vict. c.* 82.

Mr. W. F. Robinson applied for leave *ex parte* to give notice of motion for a rehearing of the appeal in this suit. The appeal was from a decree of the Vice-Chancellor of the Duchy, and had been heard before the Lords Justices Wood and Selwyn.

Their Lordships observed that this Court was in the strict sense of the term, and by statutory enactment, an appeal Court from the Duchy of Lancaster. There was no precedent for a rehearing in the House of Lords. They therefore refused the motion.

Lords Justices. March 19. } *Ex parte* Watson, *Re* Watson.

Bankruptcy—Submission to Jurisdiction—12 & 13 *Vict. c.* 106, *ss.* 12, 120, 126.

This was an appeal from an order of the judge of the Derbyshire County Court. John Watson the elder became bankrupt in October 1868. He had previously borrowed from his son, John Watson the younger, sums amounting to about 60*l.* Shortly before his bankruptcy in 1868 he had purchased a small copyhold property, which, in September of the same year, he surrendered to his son. On January 15 last the bankrupt applied for his discharge, but this was opposed by a creditor. On the same occasion both the bankrupt and his son were examined, and the judge made an order postponing the discharge of the bankrupt, and directing that the surrender of the copyhold premises to the son should be declared void on the ground of fraudulent preference, and that the same should be sold and the proceeds divided amongst the creditors of the bankrupt. From this order John Watson the son appealed.

Mr. F. Knight, for the appellant, contended that John Watson the son had not submitted to the jurisdiction of the Court, and therefore that the Court had no power to make the order appealed from.

Mr. Eddis, for the official assignee, argued that on

the evidence the appellant had submitted to the jurisdiction.

Their Lordships said that it was clear that the order could not be maintained under section 126 of the Bankruptcy Act, 1849. The only question was whether the appellant had submitted to the jurisdiction of the Court under section 12 of the same Act. They were of opinion that he had not so submitted; he had only appeared to be examined, as he was bound to appear when summoned under section 120. The order appealed from must be discharged.

Lord Romilly, M.R. March 24. } Crossley *v.* Dixon.

Chief Clerk's Certificate.

The plaintiffs had instituted a suit in respect of a patent for machinery for the manufacture of carpets. That suit was decided in favour of the plaintiffs, 32 Law J. Rep. (N.S.) Chanc. 617. The machines had been made by Messrs. Sharp, who had taken out a patent; but it was held that the machines embodied the invention of which the plaintiffs were then the patentees. On reference to Chambers, however, it was certified that some of the machines were not within the patents. The plaintiffs had since purchased Messrs. Sharp's patent; for an account under which this the present suit was brought. One of the defences was that the chief clerk had certified in the former suit that the machines in question did not infringe the patents.

Mr. Grove, *Sir R. Baggallay*, and *Mr. Cracknall* for the plaintiffs.

Sir R. Palmer, *Mr. Jessel*, *Mr. Speed*, and *Mr. Theodore Aston* for the defendants.

The Master of the Rolls thought the plaintiffs were not concluded by the certificate in the former suit. Though the suits were nominally between the same parties, the interests were different.

Lord Romilly, M.R. March 24. } Land Credit of Ireland Co. *v.* Lord Fermoy.

Directors—Breach of Trust—Interest.

On the formation of the above company the directors had speculated in purchasing shares of the company with the funds of the company. This was a suit to make them recoup the company what they had expended in such speculations.

The transactions had been done through an executive committee, but the directors had at their meetings authorised the payment of the money necessary to pay for the shares which had been bought for the company.

It was contended on behalf of several of the defendants that they had relied on the executive committee, and did not know for what purposes the money was applied.

Sir R. Baggallay, *Mr. Swanston*, and *Mr. Shebbeare* for the company.

The *Solicitor-General*, *Sir R. Palmer*, *Mr. De Gex*, *Mr. Southgate*, *Mr. Roxburgh*, *Mr. Wickens*, *Mr. Speed*, *Mr. Cracknall*, *Mr. Locock Webb*, *Mr. Jackson*, and *Mr. Waller* for the various defendants.

March 24.—The Master of the Rolls said the speculations were clearly *ultra vires*. The directors had all attended the meetings at which the payments were sanctioned, except a Mr. Finch, who had been present when payments to the amount of 2,000*l.* were sanctioned, for which he was liable, and Mr. Lewis, who had died in the meanwhile, and left an utterly insolvent estate, and whose case it was not necessary to go into. If the directors did not know for what the payments were made, it was their duty to do so. It was not necessary to go into the question of greater or less liability. The defendants were ordered to repay the money, but without interest.

Lord Romilly, M.R. March 22, 23, 24. } *Re* New Zealand Banking Corporation.

Equitable Appropriation of Securities.

The applicants in this case were the assignees for the benefit of the creditors of Messrs. Levi & Co. Messrs. Levi had deposited with the New Zealand Banking Corporation certain securities to cover all liabilities incurred by the bank for them. The only liabilities at the time of the winding-up of the corporation, included in this security, were certain bills drawn by an Australian firm and indorsed by Messrs. Levi.

This was a summons to make the official liquidator apply the proceeds of the securities towards payment of the bills, in order to clear the estate of Messrs. Levi from liability to pay a dividend on more than the balance.

Mr. Hinde Palmer and *Mr. Everitt* for the applicants.

Mr. Jessel and *Mr. Wickens* for the liquidator.

Mr. Everitt replied.

The Master of the Rolls refused the application.

Malins, V.C. March 22. } *Re* The Credit Foncier and Mobilier of England.

Voluntary Winding-up—Inspection of Books by Contributory—Companies Act, 25 & 26 *Vict. c.* 89, *s.* 138.

Summons on behalf of a contributory in the voluntary winding-up of this company for the production of, and leave to inspect, the books of the company for the purpose of examining witnesses previous to the hearing of a winding-up petition in Court which had been presented by the applicant. The liquidators had refused to allow the applicant to inspect the books otherwise than in the examiner's office at the time of examination, which was practically a useless concession in consequence of their number and the complicated nature of the transanctions therein contained.

Mr. Glasse and *Mr. Higgins* for the summons.

Mr. Waller, for the liquidators, argued that there was no jurisdiction to make the order except in a winding-up by the Court under section 156.

Mr. Fooks for the company.

Malins, V.C., held that the application could properly be sustained under section 138, and made the following order:—The petitioner, upon giving three clear days' notice in writing of the books and documents required for inspection, to have liberty, on the fourth and following days, to inspect the same at the offices of the company, between the hours of ten and four.

James, V.C. March 17. } Watts *v.* Hughes.

Practice—Bill pro confesso—Decree Absolute—Dispensation with Service—Gen. Ord. XXII. Reg. 8, 11, 15.

Administration suit. One of the defendants, who was tenant for life of real estate comprised in the suit, was in New Zealand. The bill had been taken against him *pro*

confesso, and he could not be found to be served with the decree. Thereupon, a question arose how the Court could proceed under a decree for the sale of the real estate.

Mr. Druce for the plaintiff, and

Mr. Osborne Morgan, for a defendant, called the attention of the Court to the General Order XXII., rules 8, 11, 15, and suggested that although the impossibility of finding a defendant, or the expense of so doing, did not appear to be a reason for dispensing with service of the decree before the expiration of three years, yet the Court could proceed under it now without service, and at the end of three years they could come to the Court to ask for dispensation of service.

JAMES, V.C., thereupon made an administration decree in the usual form, directing a sale and accounts in the usual way.

JAMES, V.C.
March 22. } HAIG *v.* HAIG.

Reforming Settlement—Usual Power Omitted.

This was a bill to rectify the settlement made upon the marriage of the plaintiff with the defendant, William Haig. The property comprised in the settlement was property to which the plaintiff was absolutely entitled, and she was nearly 29 years of age at the time of her marriage. The actual instructions for the settlement were given by the plaintiff's father, her intention being that the property should be settled upon her and her children 'in the usual way.' By the settlement the income was settled on the plaintiff for her sole and separate use during the joint lives of her and her husband, then to the survivor for life, with remainder as to the corpus for the benefit of the children. In case there should be no child who should take a vested interest, the property was given to the plaintiff absolutely in case she survived her husband, but in case she predeceased her husband, to her next of kin as if she had died unmarried.

The plaintiff asked that the settlement might be rectified by giving her a general power of appointment in the event of there being no child who should attain a vested interest, and of her predeceasing her husband.

It appeared that the omission of such a power was not specially brought to the notice of either the plaintiff or her husband, and they both gave evidence that they were not till lately aware of the omission.

Mr. Druce and *Mr. Freeman* for the plaintiff.

Mr. W. Pearson for the persons who would be the plaintiff's next of kin in case of her death at the present time, consented.

Mr. Drury for the trustees of the settlement, and the infant child of the marriage.

JAMES, V.C., thought that, upon the instructions given, a draftsman of competent skill would not have omitted a power of the kind referred to without specially drawing the attention of the parties to such omission, and having their specific consent to it. In the present case this was not done; and, on the authority of *Harbidge* v. *Wogan*, 5 Hare, 258, His HONOUR thought the settlement ought to be rectified by inserting such a power to be in the form adopted by the Court in the case of settlements made under its direction.

JAMES, V.C.
March 12, 15, 16, 19, 24. } LORD DUNDONALD *v.* MASTERMAN.

Solicitor and Client—Retainer of One Member of a Firm —Liability of the other Members.

The defendants, Messrs. Masterman, Upfill & Brutton, were some time in partnership as solicitors, and one of them, Brutton, was introduced to the plaintiff, who was under considerable pecuniary liabilities. The plaintiff's property, consisting to a great extent of a claim in relation to an estate at Trinidad, and of demands against the Government of Brazil, was not immediately realisable, and in the mean time some creditors were pressing. The plaintiff accordingly consulted Brutton as to the best mode of dealing in reference to his assets and liabilities. Much advice was given to him, and amongst other things a trust deed was executed by the plaintiff, and Brutton and Masterman were constituted the trustees. Brutton having received and misappropriated a considerable amount of the plaintiff's moneys, the bill was filed seeking a declaration that all the defendants were liable in respect of Brutton's acts.

The defence was that the plaintiff was the client of Brutton alone, and not of the firm.

It appeared that except on one or two occasions when the plaintiff called at the offices of the firm, and Brutton was absent, Brutton alone was personally consulted by the plaintiff, and that the other defendants had a very slight acquaintance with his business. The acquaintance between the plaintiff and Brutton seems to have ripened into friendship, and letters of a very familiar and friendly kind passed between them. But all Brutton's attendances and other labour in reference to the plaintiff's affairs were entered and charged for in the books of the firm, although this seems to have been done by or under the direction of Brutton.

Mr. Amphlett and *Mr. Bagshawe* for the plaintiff.

Mr. Garth (of the common law bar) and *Mr. Cottrell* for Masterman.

Mr. Druce and *Mr. Freeman* for Upfill.

Brutton did not appear, and the bill was taken *pro confesso* as against him.

JAMES, V.C., held that Brutton was retained as a member of the firm, and that by such retainer the relation of client and solicitor was constituted between the plaintiff and all the defendants; that nothing subsequently occurred which amounted to a discharge of this relation as between the plaintiff and any of the defendants, and that consequently all the defendants were liable in respect of the misapplication of the plaintiff's moneys. His HONOUR also held that, as to any moneys subject to the trust deed, Upfill was *functus officio* on such moneys reaching the hands of the two trustees, Masterman and Brutton. Decree for an account on the footing of declarations to the above effect. Defendants to pay costs up to and including the hearing.

Probate and Matrimonial Causes.

Probate.
March 16, 23. } *In the goods of* JOHN RISDON.

Wife Administratrix—Chose in Action—Husband—Grant de bonis non.

John Risdon died in March 1865, a widower, without child or parent or any known relation, and intestate. In May 1866 letters of administration were granted to Mary Ann Sarah Hooper as a creditor on the estate, which consisted, among other property, of two leasehold houses mortgaged to the Perpetual Building Society. She got in a considerable portion of the estate, and paid some of the debts. In July 1868 she intermarried with Edward Hibberd, who thereupon entered into possession of the leasehold houses, and paid the ground-rents and taxes, and the monthly instalments on the mortgages as they became due. In September 1868 Mary A. S. Hibberd died, leaving part of the estate unadministered, and the debt in respect of which she obtained the administration still due and unpaid.

Bayford (March 16) moved for a grant *de bonis non* to Edward Hibberd, the husband.

Sir J. P. WILDE, March 23.—This is an application for a grant of administration *de bonis non* to the personal estate and effects of John Risdon, deceased. After the death of the intestate, letters of administration were granted to Mary Ann Sarah Hooper as a creditor, and under the grant she got in a considerable part of the estate, and paid some of the debts. She then married the present applicant. Within a month or six weeks after the marriage she died, and the present applicant applies for the grant of administration as a creditor on the estate of the original deceased. Now, it is obvious there was no debt due to him. But he says that the debt was due to his wife and to him *jure mariti*, and that he has reduced it into possession. I think that is a contention that cannot be maintained. What he really did was this—to take possession of that part of the estate which was in his wife's hands under the letters of administration at the time he married her, and to retain possession of it. But that is not reducing into possession the debt, because, before a debt can be said to be reduced into possession as a *chose in action*, something must have been done to satisfy it, and no part of the estate has here been set aside or appropriated for the payment of the debt. Indeed, the present position of the applicant is an inconsistent one, because he comes here to ask for the grant as a creditor, which implies that the debt is still owing, and at the same time he alleges that the debt has been reduced into possession—that is to say, that a sum of money has been set apart in discharge of it. I therefore think that he cannot take the grant in the way in which he asks for it. He must first take administration to his wife, and then he will of course be entitled to the grant.

Divorce and Matrimonial Causes.
March 16. } HAIGH *v.* HAIGH.

Permanent Alimony—Settled Property—Large Proportion brought in by Wife—Rate of Allowance.

The wife had obtained a decree of judicial separation on the ground of cruelty, and the case now came before the Court on the question of permanent alimony. The respondent's income (derived from property comprised in the marriage settlement) was reported by the registrar at 341*l.* per annum, and of this sum 210*l.* per annum was derived from property which formerly belonged to the petitioner, and was included in the settlement.

Dr. Deane (with him *Searle*) moved that the income of the whole of the property brought in by the wife might be allotted to her as permanent alimony.

Dr. Tristram for the respondent.

The JUDGE-ORDINARY.—The question is, on what principle the Court is to act in allotting permanent alimony in suits for judicial separation. The Court is invited to adopt by analogy the principle on which it acts in suits for dissolution of marriage; but the powers given to the Court in suits for dissolution are defined by certain sections of the statute, and the Legislature has advisedly not extended the powers contained in those sections to suits for judicial separation. Section 22 of the Divorce Act defines the principles and rules by which the Court is to be guided in suits for judicial separation—namely, the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief. Let us see what the principle of the Ecclesiastical Courts was. It would be equitable to say that where a wife has brought a sum of money, whether large or small, to her husband, and the cohabitation contemplated at the time of the marriage has become impossible by reason of the husband's misconduct, the wife should receive back the money which she had brought to the common fund, whatever it may be. I think that would not be an unreasonable principle; at any rate it would be an intelligible principle. But the Ecclesiastical Courts never did proceed on that principle. There is no trace of it in the reports. The rule laid down by those Courts was to take all the circumstances of the case into consideration, and having regard to those circumstances to allot a certain proportion of the joint income. In ordinary cases the principle was to give one-third. The highest proportion ever allotted in any case was one-half, and that I shall allot in this instance. Taking the joint income at 340*l.* I allot 170*l.* payable quarterly.

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Feb. 10, 11, March 24. } ney Sussex College.

Will—Devise to a College for Education in Piety and Learning of Descendants of A.—Construction.

Francis Combe, by his will dated in 1681, enfeoffed Sidney Sussex College, Cambridge, and Trinity College, Oxford, and their successors for ever, with his real estate at Abbots Langley, equally between the said colleges for the only use, education in piety and learning of four of the descendants of his brothers and sisters, and three of the descendants of the brothers and sisters of his first wife, and three of the descendants of the brothers and sisters of his second wife, or in default of such, to their next poor kindred—for the first by the father's side, for the second by the mother's side.

On the case coming on before the Master of the Rolls on further consideration, for a decision on the construction of the will, and for a scheme, His Lordship held that the gift was not to be confined to education at the colleges themselves; that the word 'descendants' included both male and female descendants, and descendants of any age who required education; that the lands were to be held by the colleges in trust for the education of the descendants, ten in number, whether male or female or of whatsoever age, of the persons named in the will, to be selected in turn by the two colleges; and in default of such ten persons, the income was to be applied for the poor kindred named in the will. From this decision the two colleges appealed.

Mr. Cole and *Mr. Rigby* for Sidney Sussex College.

Mr. Jessel and *Mr. Vaughan Hawkins* for Trinity College.

Mr. Wickens for the Attorney-General.

Mr. Hinde Palmer and *Mr. Bedwell* for the relator.
Mr. Hemming for other descendants.

The Lord Chancellor could not agree with the decision of the Master of the Rolls. Looking at the words of the will, and also, as he was entitled, to the circumstances under which, and the time when the will was framed, he was of opinion that the gift of the real estate was made to the colleges as tenants in common upon trust to educate according to the regulations and discipline of the colleges, and within their own walls, such of the descendants, not exceeding ten, of the persons named in the will as were competent and willing to receive such education; and as it appeared, from the Chief Clerk's certificate, that there were many such descendants in existence, it was unnecessary now to give any decision as to the construction of the gift over in default of such descendants; a declaration must, therefore, be made to the above effect, and the order of the Master of the Rolls varied accordingly.

Lords Justices. April 15. } *Re* The Estates Investment Company. Pawle's Case.

Company—Misrepresentation—Contract to take Shares—Contributory—Delay.

This was an appeal by the official liquidator from an order of the Master of the Rolls removing the name of Mr. Pawle from the list of contributories of the above-named company. The case is noted *antè*, p. 52.

Their Lordships dismissed the appeal with costs.

Lords Justices. April 16, 17. } *In re* The General Rolling Stock Co. (Lim.). *Exparte* Alliance Bank.

Deposit of Shares as Security for Bills—Original and Renewed Bills—Right of Transferees.

This was an appeal from the decision of the Master of the Rolls noted in the Notes of Cases, 1868, p. 286, where the facts appear.

Sir R. Baggallay and *Mr. Eddis* for the appellant, the Alliance Bank.

Mr. Jessel, Mr. Winterbotham, Mr. Wickens, and *Mr. Davey* for various holders of bills of the 5th set.

Mr. Southgate and *Mr. Bagshawe* for the official liquidator of the General Rolling Stock Company.

Mr. Roxburgh for the representatives of Mr. Murray.

Their Lordships held that it was quite competent for the parties to a transaction such as that in *Ex parte Waring*, 19 Ves. 345, or the present case, before their insolvencies, to deal with the deposited securities by new agreement, notwithstanding that the bills had been discounted; and further, that the substitution or intended substitution of the 5th set for the 4th set of bills in the present case was such a dealing as took away from the holders of the 4th set the chance they had of deriving benefit from the securities, and therefore the Alliance Bank had no claim upon the deposited shares. Their Lordships expressed their opinion that the doctrine of *Ex parte Waring* applied to a case where the insolvent parties were two insolvent companies in course of winding-up, or, as here, a company being wound up, and the insolvent estate of a deceased person, or to any other analogous cases of insolvency. No proceeding was, however, before them upon which they could make any order in accordance with this opinion, and therefore the appeal was simply dismissed with costs.

Lord Romilly, M.R. March 17, 19, 22, April 16. } Heath *v.* Bucknall.

Light—New Building—Ancient Lights partially Retained—Tapling v. *Jones.*

The plaintiff in this case had pulled down a house containing ancient lights, and erected in its place a building of more than double the height, with many new windows, occupying, in small portions only, the positions of the old ones. These had been obstructed by the defendant, and the present suit was instituted to restrain the continuance of the obstruction. The plaintiff relied upon *Tapling* v. *Jones*, 11 H. L. Cas. 290.

Mr. Southgate and *Mr. Bagshaw* were for the plaintiff.

Sir Roundell Palmer, Mr. Jessel, and *Mr. Rodwell* for the defendant.

April 16.—The Master of the Rolls held that the plaintiff had deprived himself of the right to the assistance of a Court of equity. The new building was such as would, after the lapse of time, impose a new servitude on the servient tenement, and on the principle laid down in *The Curriers' Co.* v. *Corbett* (2 Dr. & Sm. 355), which His Lordship did not consider to be overruled by *Tapling* v. *Jones*, a Court of equity would not enforce a new servitude, although an action might lie at common law. The bill therefore was dismissed, with leave to the plaintiff to bring any action which he might be advised to bring.

Lord Romilly, M.R. April 17, 19. } Joddrell *v.* Joddrell.

Apportionment Act, 4 & 5 Wm. IV. c. 22—Proceeds of Sale of Timber—Dividends Payable under Decree of the Court.

By a will made since the Apportionment Act lands were devised to a person for life with impeachment of waste; with remainder to the petitioner for life without impeachment of waste. In the lifetime of the former the Court had allowed some timber on the lands to be felled and sold, and by the decree in the cause, dated in 1859, had ordered the dividends of the timber money to be paid to the first life tenant during his life. On his death the second tenant for life presented a petition for transfer out of Court of the funds above mentioned; and the only question was, whether the personal representatives of the late tenant for life were entitled to a proportionate part of the half-year's dividend accruing at his death.

Mr. Rigby for the petitioner.

Mr. Dryden for the representatives of the late tenant for life.

The Master of the Rolls held that the decree was not an instrument in writing within the meaning of the Act, and that, in consequence, there would be no apportionment.

Lord Romilly, M.R. April 19. } Horsley *v.* Cox.

Costs—Number of Counsel.

This was a summons to review a taxation of costs, in which the taxing master had allowed the costs of a brief to a second Queen's counsel, on the ground of his having been the junior counsel in the cause, and having, before the hearing, been appointed one of Her Majesty's counsel.

The question was whether such allowance was proper.

Mr. Locock Webb in support of the summons.

Mr. Southgate and *Mr. Edmund James* in support of the taxing master's certificate.

Lord Romilly, M.R., dismissed the summons, but without costs, observing that there were cases both for and against the decision of the master, and that if a brief had not been given to the counsel who had been called within the bar, he might have been retained by the other side with all the knowledge obtained by him in the suit, to the disadvantage of his former client.

Stuart, V.C.
April 16. } *Re* Delamain's Trusts.

Will—Gift to the 'Children of my Sister and my Brother'—Gift to a Class.

A testator gave the residue of his property 'to be divided equally between and among the children of my sister Elizabeth Thompson and my brother E. S. Delamain.' The money representing the residue of the testator's estate having been paid into Court under the Trustee Relief Act, the question now argued was whether the gift was to be read as a gift to the children of the testator's sister and to his brother in moieties, or to the children of the sister and the children of the brother in moieties.

Mr. Bowring for the children of the testator's sister.

Mr. Sladen for the testator's brother.

Stuart, V.C., held that the gift was clearly to a class, and the only question was whether that class comprised the children of the sister and one other person, *i.e.* the brother or the children of the sister and several other persons, *i.e.* the children of the brother. The omission of the word 'of' before the words 'my brother' was of no importance, and as a gift of this kind was, according to the decision of Lord Hatherley, when Vice-Chancellor, in *Mason* v. *Baker*, 2 K. & J. 567, to be considered a gift to a class and not to an individual, there must be a declaration that the children of the sister and the children of the brother were entitled in equal shares.

Stuart, V.C.
April 15, 16. } Taylor *v.* Wemyss.

Plea—Outlawry of Co-Defendant.

The bill was filed by a judgment creditor of the defendant Charles Thomas Wemyss, and after allegations to show that the plaintiff had not succeeded in levying execution, stated that C. T. Wemyss was one of two surviving children of Lady Isabella Wemyss, deceased, and that letters of administration of her estate had been granted to the Countess Reventlow Criminil, the other of such children, and that the plaintiff had recently discovered that by virtue of a certain indenture a leasehold house in Weymouth Street was vested in trustees upon trusts, under which, in the events which had happened, the defendant C. T. Wemyss was beneficially entitled to a moiety of the said house, and that by reason of the legal estate therein being outstanding, the plaintiff could not obtain the benefit of his judgment. The bill then prayed an account of what was due on the judgment, that the share of C. T. Wemyss, as next-of-kin of his mother, might be ascertained, and, if necessary, his estate administered; that the trusts of the said indenture might be carried into execution, and the amount due to the plaintiff satisfied out of the share of C. T. Wemyss thereunder. The defendants were, C. T. Wemyss, the Countess Reventlow and her husband, and the trustees; and the Count and Countess pleaded in bar to the bill that the defendant, C. T. Wemyss, was an outlaw, and that all personal property to which he was entitled was vested in the Crown, and that Lady Isabella Wemyss died possessed of personalty only; and they annexed to their plea a certified copy of the outlawry *sub pede sigilli*.

Mr. Karslake and *Mr. Waugh* for the plea.

Mr. Fry and *Mr. Edwyn Jones*, for the bill, contended that the plea of outlawry was a plea in abatement, and not in bar; moreover, the defendants had not pleaded the record of enrolment, at which alone the Court would look, as the Crown had no right until enrolment.

Stuart, V.C., said that the plea was good and well pleaded; it was a plea in bar, though in bar only during outlawry. His Honour considered that the averment of the outlawry *sub pede sigilli* in this case was sufficient, and an averment of the enrolment unnecessary, and allowed the plea.

Stuart, V.C.
Feb. 11, 12, 19.
March 24. } Woodhouse *v.* Woodhouse.

Trustee and Cestui que Trust—Non-Enforcement of Covenant—Breach of Trust—Privity—Lapse of Time.

The settlement executed on the marriage in 1816 of J. T. Woodhouse and Clara Oppenheimer contained a covenant by J. T. Woodhouse and his father, E. Woodhouse, that they or one of them would, within three years after the marriage, pay 3,000*l.* to the trustees of the settlement (of whom Joseph Woodhouse, a solicitor, was one), to be settled upon the usual trusts for the husband and wife and issue of the marriage; and a further covenant by J. T. Woodhouse, that unless that sum were paid within the three years, he would secure it by a mortgage of certain property.

The 3,000*l.* was not paid, nor was the property mortgaged, and the trustees made no attempt to enforce either of the covenants.

In 1846 J. T. Woodhouse sold the property subject to the covenant, and Joseph Woodhouse acted as solicitor for the purchaser.

Joseph Woodhouse survived his co-trustee, and died in 1848, having by his will devised his realty, and bequeathed a portion of his personalty to his sons, and appointed his widow executrix.

In 1852 J. T. Woodhouse became bankrupt, and applied to the executrix of Joseph Woodhouse to prove under the bankruptcy for 3,000*l.*; but she refused to do so, except upon receiving a release in full, and she also declined to concur in appointing new trustees. Dividends amounting to 11*s.* in the pound having been declared under the bankruptcy, new trustees were appointed by the Court, who tendered a proof, which was rejected as not made within the proper time.

The executrix of Joseph Woodhouse died in 1865, and his sons entered into possession of his property.

J. T. Woodhouse died in 1865, and the present suit was instituted on October 2, 1867, by his widow and children against the sons of Joseph Woodhouse, for the purpose of having his breach of trust made good out of his assets come to their hands. The sons were cited to take out letters of administration to their father's estate, and having refused, an administrator *ad litem* was ap-

pointed. The sons admitted assets of Joseph Woodhouse in their possession.

Mr. Greene and *Mr. Babington* for the plaintiffs.

Mr. Dickinson and *Mr. Chitty* for the sons of Joseph Woodhouse: There is no sufficient legal personal representative of Joseph Woodhouse before the Court, and there is no privity between our defendants and the plaintiffs; moreover, the rights of the plaintiffs are barred by lapse of time.

Mr. John Edwards for the administrator *ad litem*.

Stuart, V.C., said that the concurrence of Joseph Woodhouse in the sale of 1846 was a gross breach of trust, and the covenants being continuing obligations, it was a continuing duty in Joseph Woodhouse to enforce them. Soon after his death, his widow and executrix, and also his sons, the devisees, were cognisant of the trust and its breach. The refusal of the widow to prove in 1852 was a double breach of trust. The sons having declined, when cited, to constitute themselves the legal personal representatives of their father, and having admitted assets of his in their hands, the administrator *ad litem* was a sufficient representative for the purposes of the suit, and it was impossible for the defendants, the sons, to fix upon any date when the rights of the plaintiffs were barred by lapse of time, or to say that the assets in their hands were not liable to the plaintiffs' claim. The decree would therefore be that Joseph Woodhouse, the trustee, by not enforcing payment, had committed a breach of trust, and that the defendants having admitted that they had assets of his in their possession, were, to the extent of those assets, liable to make good the 3,000*l.*, with interest at 5 per cent. from April 14, 1866, the day of the death of the tenant for life.

Malins, V.C.
April 16. } Howard *v.* Kay.

Tenant for Life—Timber—Assignment of Lease—Lord St. Leonards' Act, 22 & 23 Vict. c. 35.

Two petitions. One William Kay was tenant for life of certain lands the subject of this suit, with remainder as to a moiety thereof on his death without issue (which event had recently happened) to the first petitioner. In pursuance of an order of May 1861, certain timber had been felled and sold, and the proceeds of the sale, amounting to 956*l.*, were ordered to be invested for the benefit of the estate; instead of this, however, they were applied to certain repairs, for which it was admitted the tenant for life was entitled to be recouped out of the estate. The questions on the first petition were, was the wood then felled actual timber or underwood? If underwood, was the tenant for life entitled to the proceeds of the sale, or was the petitioner, as tenant in remainder of a moiety, entitled to be repaid 478*l.*, being a moiety of such proceeds from the estate of the tenant for life deceased?

The second petition arose in respect of certain leaseholds, formerly part of the same estate, which were held on beneficial lease of the Dean and Chapter of Christ Church, renewable on fine at the usual periods. The original lessee had been the deceased tenant for life, but the lease had been renewed at the end of seven years in Masterman's name at his own request, as trustee for the tenant for life. Masterman had since assigned the lease, taking a covenant of indemnity against breaches, &c., from the assignee. He now petitioned that a certain fund should be set apart out of the personal estate of the deceased tenant for life to answer any breaches of covenant committed by the tenant for life previous to the assignment.

Mr. Glasse, Mr. Shapter, Mr. Cotton, Mr. Fry, Mr. Rasch, and *Mr. Walford* appeared for the parties interested.

The Vice-Chancellor held, on the evidence in the first petition, that it was impossible, without further inquiry, to distinguish exactly what part of the wood felled was timber and what underwood; that it was not all timber was clear from the fact that the 2,500 trees felled sold at an average price of 8*s.* 6*d.* a piece. The tenant for life was clearly entitled to all underwood; he thought a further reference to Chambers on the point would be unsatisfactory, and on the facts stated awarded a sum of 300*l.* as the value of a moiety of the timber, with interest at 4 per cent. from the death of the tenant for life. On the second petition, the Vice-Chancellor was clearly of opinion that Masterman was not entitled to have a fund retained in Court for the purpose of answering possible breaches of covenant by the deceased previous to the assignment. The case was covered by *Dodson* v. *Sammell*, 1 Dr. & Sm. 575; s.c. 30 Law J. Rep. (N.S.) Chanc. 799, and also came within the operation of Lord St. Leonards' Act, 22 & 23 Vict. c. 35. The only argument in favour of Masterman was that the renewed lease had been granted to him in his own name; but this was done at his own request, and he had forborne at the time to require an indemnity from the previous lessee. The petition must be dismissed: costs out of estate.

Malins, V.C.
April 17. } *Re* Roberts' Trusts.

Trustee and Cestui que Trust—Legacy to Married Woman—Payment into Court—Costs.

Testator, dying in 1851, bequeathed the sum of 1,200*l.* to trustees to pay the income to his widow for life, and then to divide the capital between his two grandchildren, one of whom was now a married woman. The income was paid to the widow for seventeen years; on her death the grandchildren applied for payment of their legacies, but the trustees refused to pay over the fund to them without a release and indemnity, alleging that some claim had been made by other beneficiaries under the will. The legatees refused to execute any release, and the trustees thereupon paid the fund into Court.

Mr. Woodhouse, for the grandchildren, now petitioned for payment out, and that the trustees might be ordered to pay all costs.

Mr. Owen, for the alleged claimants, repudiated any interest in the fund, and asked for costs.

Mr. Willis, for the trustees, submitted that they were justified by the fact of one of the legatees being a married woman, and therefore entitled to an opportunity of asserting her equity to a settlement *Re Swan*, 2 H. & M. 34.

Malins, V.C.—It was the duty of the trustees to pay over the 1,200*l.* immediately after the widow's death, and they had no right to call for an indemnity, the receipt of the legatees being quite sufficient discharge. After paying the income to the widow for seventeen years, there could be no question as to the title of these specific legatees, nor was there in fact any substance in the alleged claims. The payment into Court under the circumstances was, in his opinion, unnecessary and vexa-

tious. It is now sought to justify the conduct of the trustees upon the authority of the decision in *Re Swan*. But I cannot accede to the proposition that it is the duty of trustees in all cases of legacies to married women to incur the expense of paying the fund into Court, merely to obtain the lady's formal consent to the payment of the money to her husband. In the present case there has been no application whatever by the trustees to the lady upon the subject, although she was ready at any time to give her consent. The attempted justification, therefore, is a mere afterthought, and cannot be sustained. The trustees must pay all costs occasioned by their payment of the fund into Court.

MALINS, V.C. April 19. } *Re* PERUVIAN RAILWAYS COMPANY (LIMITED). SAWAR'S CASE.

Joint-stock Company—Shareholder—Nominee—Fictitious Payment of Calls.

Adjourned summons by the official liquidator of this company, that one Sawar, who was admitted to be a shareholder in the company, should be placed on the list as a contributory for 100 shares at 25*l.* each, 3*l.* paid. Sawar was a nominee of the International Contract Company, which had agreed to take a certain number of shares in the Peruvian Company either by itself or its nominees. By an article in the agreement between the two companies, the International Company was to be allowed to pay up in full any shares so taken by or for them, and the amount of such shares was to be returned to them as deposited security for the repayment of advances made by them to the Peruvian Company. In accordance with this agreement, on October 25, 1865, a sum of 488,588*l.* was paid on account of shares (Sawar's among the number) by the International Company, and on the same day a corresponding sum was returned to them. Both companies were afterwards wound up.

Mr. Glasse and *Mr. Kekewich*, for the official liquidator, contended that no money had in fact been paid on Sawar's shares beyond the 3*l.* paid on allotment, and that the shares were still liable in his hands to calls to the amount of 22*l.* a-piece.

Mr. Cole and *Mr. Ince*, for Sawar, contended that the transaction was warranted by the terms of the agreement, and that in any case Sawar, as a stranger to the two parties, ought not to suffer for their misdeeds.

The VICE-CHANCELLOR was of opinion that the case was the same in spirit and substance with *Crawley's case*, in the same winding-up (17 W. R. 454, affirmed on appeal). The pretended payment in full of the shares held by Sawar as nominee of the International was a mere juggle between the two companies. Sawar must be retained on the list as a contributory, and pay the costs of the adjournment into Court. No costs of the summons.

JAMES, V.C. April 16. } *Re* DAVIS' TRUSTS.

Practice—Affidavit Sworn Abroad before Notary.

Mr. Lawson applied to the Court for leave to file affidavits made in the United States. The document in question contained the written evidence of five witnesses included between the title of the matter and one jurat referring to all five witnesses as sworn before a notary public, and each witness had signed his own statement. The seal of the notary was affixed, but such seal was not verified.

JAMES, V.C., gave leave to file the document, upon production to the registrar of a certificate from the United States Legation, verifying the notarial seal and certifying that the document in its present form would be admitted in evidence in the United States.

JAMES, V.C. April 17, 19. } THE ENGLISH JOINT STOCK BANK *v.* BRODIE.

Guarantee of Promissory Notes to be in Force for Twelve Months—Notes Renewed.

The question in this case was as to the extent of the following guarantee:—

London, June 17, 1864.

To the Manager of the Metropolitan and Provincial Bank (Limited).

Dear Sir,—In consideration of your discounting the promissory notes of James Ash & Co. for the sum of ten thousand pounds (say 10,000*l.*), we hereby jointly and severally guarantee the due payment of the same at maturity as if they were indorsed by us; this guarantee to be in force twelve months from this date, and to include the promissory note of 3,000*l.* discounted by you on the 15th instant.

JOHN STEWART.
JOHN BRODIE.

On the faith of this guarantee the Metropolitan Bank discounted for James Ash & Co., in addition to the note for 3,000*l.*, their promissory note for 7,000*l.*, dated June 17, 1864, payable three months after date; and the same having arrived at maturity on September 20, 1864, was renewed by James Ash & Co., giving to the Metropolitan Bank a second note of that date at three months for 7,000*l.* The latter note, therefore, fell due on December 23, 1864, and within the twelve months limited by the guarantee, and the question was whether the guarantors were liable in respect of it.

JAMES, V.C., held that the guarantee extended to any renewals of the original notes, provided the total amount of the notes covered by the guarantee did not exceed 10,000*l.*, and that they fell due within twelve months from June 17, 1864.

Courts of Common Law.

Queen's Bench.
Feb. 2, 3,
April 20.
} Taylor *v.* Chester.

[*Immoral Contract—Pledge for Immoral Purposes—Pleading.*

Declaration on the bailment of half a 50*l.* Bank of England note to the defendant to be redelivered on request alleging a refusal by the defendant to redeliver it. Second count in detinue for the same half note. Special plea to each count, that the half note had been deposited by the plaintiff with the defendant by way of pledge to secure the repayment of money due and money then advanced by the defendant to the plaintiff and then due. Replication a joinder of issue, and that the alleged debt was for wine and suppers supplied by the defendant in a brothel kept by the defendant for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch, there to incite them to riotous, disorderly, and immoral conduct, and for money knowingly lent for the purpose of being expended in riot, debauchery, and immoral conduct. Rejoinder taking issue on the replication and demurrer. At the trial the jury found that the note was deposited by way of security, as alleged by the defendant, and that the debt was incurred and money advanced as stated in the replication. A verdict was entered for the defendant, with leave to move to enter it for the plaintiff for 50*l.*, to be reduced to nominal damages if the half note was given up. The demurrer was argued with the rule.

Holker and *Hopwood* showed cause, and contended that the plaintiff was compelled to rely upon an immoral contract in order to make out his case, and therefore could not recover.

Pope and *Herschell*, in support of the rule, argued that the common law right of the plaintiff in the note could not be affected by an immoral contract which the defendant was obliged to disclose.

The Court (Mellor, J., and Hannen, J.), after taking time to consider, now (April 20) held that the plaintiff was not entitled to recover. The maxim *in pari delicto potior est conditio possidentis* applied, the true test being whether the plaintiff could make out his case otherwise than through the medium of the immoral transaction. Here the pledge *primâ facie* was valid, and the plaintiff, in order to get rid of the answer afforded by it, was compelled to disclose the immoral transaction.

Rule discharged.

Common Pleas.
April 16.
} Biner and Others *v.* Walter.

Landlord and Tenant—Mortgagee—Ejectment—Notice to Quit.

Ejectment by mortgagees; and the question was whether the defendant, who had been let into possession by the mortgagor after the mortgage, was entitled to a notice to quit. It appeared that the plaintiffs' attorneys had served the defendant with a notice, directed to him as 'the tenant of the premises,' by which they required him as tenant of the premises to pay all rent then due, or thereafter to become due from him, to them. There was no evidence at the trial how the defendant ever got into possession, or of any tenancy having existed between him and the mortgagor. The defendant never paid any rent, or assented to the notice given him by the plaintiffs' attorneys, otherwise than by remaining in possession. At the trial, before Montague Smith, J., at the Middlesex Sittings after Trinity Term, 1868, it was contended for the defendant that a notice to quit was necessary, since the plaintiffs had recognised the defendant's possession as a lawful one, and that therefore, until such had been determined, ejectment would not lie. The case did not go to the jury, but the learned judge, by consent, directed a verdict for the plaintiffs, with leave to the defendant to move to enter a verdict for the defendant, or a nonsuit, with power to the Court to draw inferences of fact as a jury. A rule *nisi* to this effect was afterwards obtained, and

McIntyre now showed cause against the rule, and

Day argued in support of it; and the cases of *Evans* v. *Elliott*, 9 Ad. & El. 342, and *Brown* v. *Storey*, 1 Scott New R. 9, were cited.

The Court now drew as an inference of fact that there never had been a tenancy, or any assent on the part of the defendant to hold under the plaintiffs, and that the notice to pay rent had been given under the mistake that there was a tenancy existing between the defendant and the mortgagor; and as this was not the case, the notice was inoperative, and the defendant was a mere trespasser.

Rule discharged.

Common Pleas.
April 16.
} Beddall *v.* King and Another.

Debtor and Creditor—Composition Deed—Assents, Time for Obtaining—Affidavit under Bankruptcy Act, 1861, *s.* 192.

Action for goods sold and delivered. Plea, a composition deed under the Bankruptcy Act, 1861. The action was tried before Cockburn, C.J., at the last Cambridgeshire Summer Assizes, when a verdict was found for the defendants, and upon a *rule nisi* to set that verdict aside, and to enter it for the plaintiff, the question now was whether the fourth and fifth conditions to section 192 of the Bankruptcy Act, 1861, had been complied with. Assents of a sufficient majority of creditors had been given in April, 1868, to a deed, making the compensation payable on May 1, 1868. The deed, which was registered, made the composition payable on June 2, 1868, and this alteration in the time was made in consequence of the deed not being ready for registration before May 2. A sufficient number of assents was obtained to the altered deed before action, but not until after the registration of the deed. The plaintiff was a non-assenting creditor.

O'Malley and *Keane* showed cause.

Bulwer and *Tindal Atkinson* appeared in support of the rule.

The Court held, confirming *Ex parte Raistrick, in re Nuttall* (37 Law J. Rep. Bankr. 12), that to comply with the conditions in section 192 of the Bankruptcy Act, 1861, required to make the deed binding on a non-assenting creditor, the assents must be given before the registration.

Rule absolute.

Common Pleas. April 17. } Woolley *v.* North-London Railway Company.

Practice—Inspection of Documents.

This was an action for damages for injury to a passenger on the defendants' railway, and the negligence imputed related to a defective construction of a locomotive engine.

Hayes, J., had made an order granting the plaintiff an inspection of a copy of a report as to the accident which had been sent by the defendants' general manager to the Board of Trade, pursuant to 3 & 4 Vict. c. 97, s. 3; also of a guarantee given in 1861 to the defendants by a manufacturer of materials for locomotive engines, part of which formed a portion of the defendants' engine at the time of the accident; also of minute-books of the directors relating to the matter in question before the action was brought.

Hawkins (*F. M. White* with him) moved to set aside such order.

The Court (Keating, J., and Montague Smith, J.) granted a rule *nisi* to amend the order so far as concerns such portions of the minute-books as embodied communications between the directors and the attorneys of the company, but refused the rest of the application, being of opinion that the order of the learned Judge was rightly made as to the other matters.

Rule accordingly.

Common Pleas. April 20. } Tebb *v.* Hodge and Another.

Bankruptcy—Fixtures put up and to be Security for Money.

The plaintiff agreed to let certain premises to one B.; B. to pay 1,000*l.*, and also expend 500*l.* in fitting them up; and the plaintiff, on payment of that sum and such fitting up, to lend B. 1,000*l.* on security of the premises so fitted up. No lease was in fact made, but B. entered and put up the fittings, and on his becoming bankrupt the defendants, as his assignees, removed the fittings; whereupon this action was brought. The plaintiff contended that there was an equitable mortgage; the defendants contended that there was not, and also that the fittings were within the order and disposition clause of the Bankrupt Acts.

Parry (*Serjeant*) and *Beasley* for the plaintiff.

Montagu Chambers for the defendants.

The Court held that the fittings were put up under an agreement whereby they were not to be removed and be a security for 1,000*l.*, and that the defendants had no right to remove them.

Common Pleas. April 21. } Coton *v.* Dorell.

Set-off—Failure of Consideration.

The plaintiff agreed that he would grant a lease to the defendant at a certain rent, 50*l.* to be paid on its being signed by both parties. At the time he had no power to grant the lease, as it turned out. The defendant entered into possession, and paid 42*l.* on account of the 50*l.* The plaintiff afterwards had power to grant, and tendered a lease on condition that the expense thereof was paid. The defendant refused to accept, on the ground that 50*l.* was to cover everything. The plaintiff brought this action for use and occupation against the defendant, who still held the premises, and the defendant sought to set off the 42*l.* The judge at the trial directed the jury that the money could not be set off.

Woollett now moved for a new trial on the ground of misdirection.

The Court held that there was no total failure of consideration, and that therefore there could be no set-off, and refused a rule.

Common Pleas. April 21. } Wetherfield *v.* Nelson.

County Court—Appointment of Deputy Registrar.

The judge of the London Small Debts Court, on finding that the registrar of his Court was not present at the sitting of the Court, appointed a deputy four days running. The assistant registrar was present, and the registrar himself was in another part of the building half an hour afterwards. The judge acted under Rule 8 of the County Court Rules of 1867. The plaintiff was the deputy so appointed, and brought his action against the defendant, the registrar, for remuneration for the four days. The verdict was for 22*l.*, with leave to enter a nonsuit.

McIntyre for the plaintiff.

Talfourd Salter for the defendant.

The Court held that, even if there was jurisdiction in the appointed County Court judges to make Rule 8, still there was no such absence as brought the case within it, and made the rule absolute for a nonsuit.

Exchequer. April 16. } Dixon *v.* Wrench.

Charging Order—1 & 2 *Vict. c.* 110—3 & 4 *Vict. c.* 82—*Interest of Judgment Debtor in Stock and Shares.*

Judgment having been obtained against the defendant in this case, Willes, J. made an order at Chambers charging certain railway shares and reduced Three per Cent. annuities in which the defendant was said to have an interest within the meaning either of 1 & 2 Vict. c. 110, s. 14, or of 3 & 4 Vict. c. 82, s. 1.

The stock and shares were not standing in the name of the defendant, but in the name of the executors of a will under which the defendant's alleged interest arose. By this will the stock and shares in question were bequeathed to trustees on trust to sell the same, and, after paying debts and certain legacies, to divide the residue of the proceeds between the defendant and his brother and sister.

A rule having been obtained to set aside the order of Willes, J.,

McIntyre now showed cause, relying on *Cragg* v. *Taylor*, 36 Law J. Rep. Exch. 63, which he contended could not be distinguished from the present case.

Day, in support of the rule, maintained that *Cragg* v. *Taylor* was distinguishable, as in that case the judgment debtor had an interest in the shares themselves,

and not, as here, in the proceeds only to be realised by sale.

The Court (Kelly, C.B., Bramwell, B., and Cleasby, B.) held that the defendant's interest was not an interest either vested or contingent in the stock or shares themselves, but an interest in the proceeds of the same when they should have been sold and turned into money under the provisions of the will; that the case was therefore distinguishable from *Cragg* v. *Taylor*, and did not come within the language of either of the Acts of Parliament mentioned above.

Rule absolute.

High Court of Admiralty.

Admiralty Court. March 23, April 13. } The Esk. The Gitana.

Damage—Vessel Getting under Way—Lights.

These were cross actions in respect of a collision between the brig Gitana and the schooner Esk, near the Gunfleet Sand, about midnight on November 13 last.

Dr. Deane and *Bayford* appeared for the Gitana; and

E. C. Clarkson and *Gibson* for the Esk.

The cause was heard on March 23, before the Court and Trinity Masters, the principal question for the decision of the Court being whether or no the Esk, which had been lying at anchor and carried only a white riding light, was actually under way at the time of the collision.

Sir R. J. Phillimore now gave judgment, and having examined the evidence, continued: Upon this evidence, and upon all the circumstances of the case, two questions may arise, one of fact and one of law. The question of fact is whether or no the anchor of the Esk was holding her at the time of the collision. Now, according to her own statement, the Esk saw the green light of the Gitana about three points on her port bow: and the Trinity Masters advise me that if the Esk was, as she represents herself to have been, then stationary at her anchor, she could have had no reason to suppose that the Gitana would not, under a starboard helm, pass her to the eastward. The Esk, however, hails the Gitana to port her helm, and at the same time hails that her anchor is 'still down,' or 'down.' The Trinity Masters are at a loss to understand why, if the Esk were held by her anchor, she should have hailed the Gitana to port her helm; while, on the other hand, if the Esk was not held by her anchor, but had canted and was forging ahead, the hailing to port the helm would be intelligible, because the Esk would in that case be actually crossing the bows of the Gitana; moreover, it strikes the Trinity Masters as a suspicious circumstance that a vessel with a proper anchor light up, as the Esk certainly had, should, nevertheless, hail the fact of her being at anchor, which it is the very object of the light to indicate. The answer that the Esk had hoisted her boom-foresail and inner-jib, which, unless she hailed that she was at anchor, might have deceived the Gitana, does not remove this suspicion; because the carrying of these sails, in conjunction with a white light, would not indicate to a person of competent nautical knowledge that she was under way. Applying my own judgment to this advice so tendered by the Trinity Masters, I have arrived at the conclusion that the Esk was not held by her anchor at the time of the collision. The finding of this fact renders it necessary for me to consider a novel question of law, of considerable importance. In the case of the *George Arkle* (Lushington, 382), in which the decision of this Court was affirmed by the Privy Council, it was ruled that a vessel driven from her anchors by a gale of wind, and setting sail to get out to sea, is, even if wholly unmanageable, 'under way' within the meaning of the Admiralty Regulations (1858), and is bound to exhibit coloured lights; and the omission in such circumstances to exhibit coloured lights, notwithstanding any difficulty and danger in which a ship may be, is negligence on her part, and renders her liable for damage done by collision. This judgment furnishes some assistance to me, but it is clearly not decisive of the present case. The object of the regulations, so far as their bearing on the present case is concerned, with respect to carrying lights, is to furnish the means of apprising other vessels whether the vessel carrying them be stationary or in motion, in order that the coming or meeting vessel may direct her course, and give the vessel carrying coloured lights, and in motion, a wider berth than she would one carrying an anchor light, and therefore stationary. This is the principle which underlies these rules. It is possible, no doubt, to draw fine distinctions between a vessel which has just actually raised her anchor off the ground, and one in the very act of doing so; but practically the true criterion as to the application of the regulations must be whether or not a vessel is actually held by and under the control of her anchor. The moment she ceases to be so she is in the category of a vessel under way, and must carry the appointed coloured lights. The case before the Court strongly illustrates the expediency of these regulations; for had the Esk. when she canted, lighted and exhibited her lamps, which appear to have been ready, her red light, instead of the white, would have been visible to the Gitana in the first instance, and the Gitana would have ported instead of starboarded, and this collision would have been avoided. I pronounce the Esk solely to blame for this collision.

Decree accordingly.

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Joint-Stock Company—List of Contributories—Agreement for Amalgamation between Two Companies unconfirmed by One of Them.

This was an appeal by the liquidator of the London and Northern Insurance Corporation from an order of Vice-Chancellor JAMES, directing the names of certain shareholders and directors in the Life Investment Mortgage and Insurance Company to be removed from the list of contributories under the circumstances mentioned *ante*, p. 79.

Mr. Amphlett and *Mr. J. N. Higgins*, for the liquidator, supported the appeal.

Mr. Kay and *Mr. Bagshawe*, who appeared for the respondents, were not called upon to support the order, and

Their LORDSHIPS affirmed the decision of the VICE-CHANCELLOR, and dismissed the appeal with costs.

LORDS JUSTICES. April 24, 26. } HOLLAND *v.* HOLLAND.

Trustee—Acceptance of Trust under Hand and Seal—Breach of Trust—Specialty Debt.

Mr. Charles Hall and *Mr. Speed*, for the simple con-

tract creditors of a deceased insolvent trustee, appeared in support of an appeal from an order of Vice-Chancellor Stuart, who held that the *cestuis que trust* were entitled to rank as specialty creditors in respect of a breach of trust committed by him.

The trust was originally created by will, and the deceased trustee had been appointed a new trustee by a deed, which was executed by himself, and contained a declaration of his acceptance of the trusteeship. This circumstance was held by the Vice-Chancellor to constitute the *cestuis que trust* specialty creditors of the trustee (see *antè*, p. 53).

Mr. Dickinson and *Mr. H. Davey* appeared for the respondents.

Their Lordships, without calling on *Mr. Hall* to reply, were of opinion, upon the construction of the deed, that it amounted to no more than an appointment of a new trustee on the one hand, and an acceptance of the trust on the other, the effect of which merely was to preclude the new trustee from afterwards denying that he had been made a complete trustee, but that there was no covenant by him, and no such covenant could be implied. The order of the Vice-Chancellor must therefore be discharged. Costs of the appellant to be costs in the cause.

Lord Romilly, M.R. } Adney *v.* Greatrex.
April 17, 21.

Will—Gift to Nephews and Nieces—Nephews and Nieces by Affinity held included in Gift.

Thomas Simmons by his will, made in 1825, gave all his property to trustees upon trust to sell, and out of the proceeds of such sale to pay to his nephew, the plaintiff, a legacy of 80*l.*, and to each of several persons whom he mentioned by name, and called respectively his nephews and nieces, but who were in fact the nephews and nieces of his wife, a legacy of the same amount. The testator then directed his trustees to pay certain annuities out of the residue of the trust funds, and after the deaths of the annuitants to divide such residue between 'all his (the testator's) nephews and nieces equally, share and share alike,' and declared that if any of his nephews or nieces should happen to die before his or her share should become payable, without leaving issue, the share of the one so dying should go amongst the survivors of his said nephews and nieces equally.

The testator died in 1825. It appeared that at the date of the will and the death of the testator he had only one nephew and one niece by blood, viz., the plaintiff, and one Sarah Oswald, deceased.

The annuitants having died, the plaintiff now petitioned to have the residuary funds, which had been brought into Court, divided between himself and the representatives of Sarah Oswald; and the question was whether the funds were so divisible, or whether the nephews and nieces by affinity were also entitled.

Mr. Jessel and *Mr. Cozens-Hardy* for the petitioner.

Mr. Fry for the representatives of Sarah Oswald.

Mr. Southgate and *Mr. Chitty* for some of the nephews and nieces by affinity.

Mr. Woodroffe for other persons in the same interest.

The Master of the Rolls held that the testator's nephews and nieces by affinity, as well as the nephews and nieces by blood, were included in the gift, and made an order for payment out of Court accordingly.

Lord Romilly, M.R. } Richardson *v.* Ardley.
April 22.

Landlord's Fixtures—Execution against Tenant—Injunction.

Demurrer for want of equity and want of parties to bill for an injunction to restrain a sale by a sheriff under a writ of *fi. fa.* The bill alleged that the plaintiffs were mortgagees, who had entered into possession and granted a lease of the mortgaged property, which included a brewery. The lease contained a covenant to leave the tenant's fixtures, except the brewery fixtures; and the tenant's fixtures other than brewery fixtures were expressed to be of the value of 50*l.* The bill then alleged that the lease had expired, but that Mr. Rose, the successor in business of the lessee, was still in occupation, and retained possession of the fixtures belonging to the plaintiffs; that the defendants had recovered judgment in an action at law against Mr. Rose; that the sheriff had entered into possession of all the property on the premises, and had advertised it for sale by auction, and that it was intended to sell the fixtures. The bill did not allege that any fixtures had been put up since the lease, nor did it allege that any of the fixtures were of special value, nor was there any allegation that notice not to sell any fixtures had been given to the sheriff or the execution creditor. Neither Mr. Rose nor the executors of the lessee were parties to the suit.

Mr. Southgate and *Mr. F. H. Colt* argued in support of the demurrer, that the remedy was by interpleader summons at law, since the sheriff had no right to sell what belonged to the plaintiffs, and the bill did not allege that he was about to do so. They also contended that the necessary parties were not before the Court.

Mr. Jessel and *Mr. Nalder*, for the plaintiffs, were not called upon.

The Master of the Rolls held that the fixtures which it was alleged the plaintiff was about to sell included those belonging to the plaintiffs, and that the plaintiffs had a remedy in equity, and he overruled the demurrer, giving the plaintiffs leave to amend as to parties.

Lord Romilly, M.R. } Wilday *v.* Sandys.
April 22.

'Public Funds or Government Securities'—Long Annuities—Conversion.

The testator in this cause directed his trustees to convert into money such parts of his personal estate as did not consist of money, or of money invested in the public funds or in Government securities. The question arose whether certain long annuities possessed by the testator had been duly converted. The will contained a power of investment in the public funds or in Government securities.

Mr. Southgate and *Mr. Round*, for the tenants for life, admitted that the trustees would not be at liberty to invest in long annuities, but contended that those which the testator possessed were excepted from the direction to convert.

Mr. Swanston and *Mr. Rotch* argued that they had been properly converted.

Sir R. Baggallay, *Mr. Bathurst*, and *Mr. Yate Lee* appeared for other parties.

The Master of the Rolls held that the long annuities came under the description of public funds and Government securities, and were not liable to be

converted. The reason why the Court did not allow trustees to invest in them under a power such as that contained in the present will was, not that they did not come within the words of the power, but that trustees, in exercising their discretion within the limits of the power, were forbidden to invest in perishable securities.

Lord Romilly, M.R. April 23. } Mildred *v.* Austin.

Judgment Creditor—Foreclosure—27 & 28 Vict. c. 112.

This was a foreclosure suit, to which both the mortgagor and his judgment creditors were defendants. None of the judgment creditors had sued out writs of elegit.

Mr. Ellis, for the plaintiff, moved for a decree making the foreclosure absolute within six months, on the ground that the judgment creditors, by reason of the 27 & 28 Vict. c. 112, had no right to redeem.

Mr. Bevir and *Mr. Langley* for the judgment creditors, and

Mr. Wellington Cooper, for the mortgagor, asked for a decree in the usual form, giving the judgment creditors six months to redeem, with a further period of three months for the mortgagor.

The Master of the Rolls made a decree allowing six months to the judgment creditors to redeem, if within that period they acquired a lien under 27 & 28 Vict. c. 112.

Lord Romilly, M.R. April 24. } *In re* Wakehurst. Peyton's Settlement Trusts.

22 & 23 Vict. c. 35—Power of Sale and Exchange—Re-investment in Freehold Ground-Rents.

A settlement, made in 1843, of real estate contained a power of sale and exchange, with a declaration that the trustees should invest the moneys to arise by such sale, or to be received for equality of exchange in the purchase of 'other manors, lands, or hereditaments, to be situate in England or Wales, of a clear and indefeasible estate of inheritance in fee simple in possession,' or of leasehold or copyhold property. The trustees, in exercise of their power, had sold part of the settled property, and had contracted to purchase the fee simple of certain houses, of which leases for terms of 99 years, from 1866, as to some of the houses, and from 1867 as to others, and respectively reserving ground-rents, had been granted. The trustees now prayed for the judicial opinion of the Court as to whether the proposed investment was within the power contained in the settlement.

Mr. Jessel and *Mr. E. S. Ford* for the petitioners.

Lord Romilly, M.R., was of opinion that the proposed investment was within the terms of the power.

Stuart, V.C. April 20. } Catt *v.* Tourle.

Brewers—Conveyance of Land in Fee—Covenant for the Exclusive Right of Supplying Beer to Premises to be Built and Opened as a Beerhouse on the Land—Breach of Covenant—Injunction—Demurrer.

The plaintiff and the defendant in this case were brewers, and the defendant was also a member of the Conservative Land Society. On September 22, 1853, the plaintiff conveyed a piece of land to the trustees of the society, in fee, for the benefit of its members; and on the occasion of that conveyance, it was agreed between the parties to it that the trustees should enter into certain covenants, to be inserted in an indenture of even date with the conveyance of the land. Accordingly, by an indenture dated September 22, 1853, and made between the trustees of the one part and the plaintiff of the other, the trustees covenanted with him that 'he, his heirs and assigns, should have the exclusive right of supplying all ale, beer, and porter which might be consumed in every house or other building which might be erected on the said piece of land, and which should be opened or used as an inn, public-house, or beershop.' The trustees of the society subsequently sold the piece of land to the defendant, with notice of the covenant. He then opened a public-house on it called 'The Duke of Edinburgh,' but notwithstanding the covenant, he supplied the house with ale, beer, and porter made by himself.

The plaintiff, therefore, filed the bill in this suit to restrain the defendant from committing a breach of the covenant. The plaintiff alleged by his bill that he was now, and always had been, ready and willing, and previous to the institution of this suit had offered to supply to the defendant, to his orders from time to time, for consumption in the house, ale, beer, and porter, all of good quality, in requisite quantities, and at market or fair and reasonable prices as specified in the same offer; but that the defendant refused such offer, and denied the plaintiff's exclusive right; and insisted that the defendant had the right of supplying his own house from breweries other than the plaintiff's. The bill then prayed an injunction against the defendant, in accordance with those allegations, and also to restrain him from selling in, or keeping in, the house any ale, beer, or porter supplied by him or by any brewer other than the plaintiff for consumption therein, and remaining unconsumed.

The defendant demurred to the bill for want of equity.

Mr. Greene and *Mr. Townsend* appeared for the defendant, and supported the demurrer, contending that the covenant was void on three grounds:—(1) That it was too vague and uncertain for this Court to enforce specific performance of it; (2) That there was no mutuality in it; and (3) That it was in restraint of trade, and, therefore, as against public policy, illegal and invalid. They also said that the covenant did not run with the land.

Mr. Karslake and *Mr. Ayrton* were for the plaintiff.

Stuart, V.C., held that the covenant was in terms plain and certain; that mutuality was not an essential quality of such covenants as these; that, although it might to a certain extent be a restraint on trade, it was not so much so as to be obnoxious to the rule of law upon that subject; and, therefore, overruled the demurrer with costs.

James, V.C. April 20. } Tennant *v.* Trenchard.

Trustee—Mortgagee—The two characters united in the same person—Sale under direction of the Court—Right of Trustee to bid.

Adjourned summons. This was an application by the plaintiff in the suit that he might be at liberty to bid at the sale of the estates directed to be sold by the decree of Lord Hatherley, L.C., on the hearing of the appeal, reported 38 Law J. Rep. Chanc. 169. The plaintiff was managing trustee under the settlement by

which the estates in question were settled, and was also entitled to a charge by way of mortgage upon the estates to a very large amount; and he instituted this suit for a foreclosure of his mortgage. The Court refused to make a foreclosure decree, but directed the estates to be sold under the direction of a judge, with the view of the plaintiff's and other charges thereupon being paid.

Mr. E. K. Karslake and *Mr. W. W. Karslake* supported the application.

Mr. Speed and *Mr. Freeling*, on behalf of some of the defendants, opposed it on the ground that the Court could not grant such a permission without the consent of the parties, who were *sui juris*, and competent to give or withhold their consent. The usual rule which prohibits a trustee for sale from bidding for the trust property must prevail.

JAMES, V.C., regretted the point had not been mentioned to the LORD CHANCELLOR. The LORD CHANCELLOR had held that although the plaintiff was entitled to a charge on the property as an incumbrancer, he still retained the character of a trustee. The plaintiff now was seeking to have the property sold, and to have his charge paid. He could not put himself in a position where his duty and interest would be in opposition. The ordinary principle must be acted upon, and the application refused.

JAMES, V.C.
April 20.

In re THE TRENT AND HUMBER SHIPBUILDING COMPANY, *Ex parte* BAILEY AND LEETHAM.

Company—Winding-up—Successful Action against Liquidator—Recovery of Costs by Plaintiffs against the Company.

Adjourned summons on behalf of Messrs. Bailey & Leetham that the official liquidator might be ordered to pay to them, in addition to a dividend upon a sum recovered by them as damages in an action, their taxed costs of the action and of this application.

On Dec. 7, 1867, the applicants obtained leave from this Court to bring against the company (which was in course of liquidation) an action for damages in respect of the non-delivery of two vessels as per contract. In the action they obtained a verdict for 11,000*l.*, subject to reduction by the award of an arbitrator to whom the question was referred. The award was for 6,083*l.* The costs of the action and reference were taxed at 516*l.* 10*s.* 10*d.* Judgment was signed for the amount on Dec. 19, 1868.

The applicants claimed to be entitled to these costs in full.

Mr. Little and *Mr. Macnaghten* supported the application.

Mr. Kay and *Mr. Higgins*, for the official liquidator, argued that they were entitled to a dividend only.

JAMES, V.C., said he was bound by *Mackrill Smith's case*, Law Rep. 3 Chanc. 125; s.c. 37 Law J. Rep. Chanc. 185. As regarded this question, there was no difference in principle between the prosecution by the company of an action which failed, and the unsuccessful defence of an action against the company. The costs of this application and of the former summons, when leave was given to the claimants to bring their action, must be allowed in full. The other costs of the claimants must be added to their debt. Costs of the official liquidator out of the estate. Leave to him to appeal from this decision.

JAMES, V.C.
March 22, 23.
April 16, 23.

WOLLASTON *v.* KING.

Instrument Void in Part—Election as against those benefiting by Voidness.

Caroline King had, under her marriage settlement, power to appoint a fund by deed or will amongst her children. She made a will by which it was expressed that she, in exercise of such power, appointed 5,000*l.*, part of the fund, after the death of James King, to such persons and in such manner as the said James King should by will (not by deed) appoint; and, subject to the power of appointment expressed to be given to James King, the testatrix appointed the 5,000*l.* to her three daughters, and to each of these three daughters she gave 8,000*l.* and other benefits out of property in every sense her own.

James King was a child of Caroline King, and therefore not in being at the date of her marriage settlement, and on this ground it was held in a former argument, reported 38 Law J. Rep. (N.S.) Chanc. 61, by GIFFARD, V.C., that the power of appointment expressed to be given to James King transgressed the rule against perpetuity, and was void, and that the three daughters took the 5,000*l.* The case was now argued on the question whether the three daughters, if they elected to take the 5,000*l.* by reason of the invalidity of the power expressed to be given to James King, were bound to compensate James King's appointees out of the other benefits given to them by the will.

Mr. Willcock and *Mr. G. N. Colt* for the plaintiffs.

Mr. Druce, Mr. Hughes, Mr. Kay, Mr. J. N. Higgins, Mr. Amphlett, Mr. Horton Smith, and *Mr. Chapman Barber* appeared for the various parties interested.

JAMES, V.C., held that the principle of election was applicable as between a gift under a will and a claim *dehors* and adverse to it; but was not applicable as between one clause in a will and another clause in the same will; and that therefore, in the present instance, no case of election arose, and that consequently the daughters could not be called upon to compensate the appointees under the son's will.

Courts of Common Law.

Queen's Bench. April 21. REGINA *v.* THE GREAT WESTERN RAILWAY CO.

Poor-Rate—Valuation List—Necessity of Renewing Application to Assessment Committee before Appealing against Second Rate—Union Assessment Committee Amendment Act (27 & 28 *Vict. c.* 39), *s.* 1.

By the Union Assessment Committee Amendment Act, 1864—27 & 28 Vict. c. 39, s. 1—'Before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union in which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: provided that after August 1, 1864, no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just, and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them; and if they amend the same, shall give notice of such amendment to the overseers, who shall thereupon alter their current rate accordingly.

Upon application to the quarter sessions for Glamorgan to enter and respite an appeal against a rate made by the overseers of the parish of St. Mary's, to which rate the appellants (the railway company) were rated upon a wharf in their occupation in the parish, the application was refused, subject to a case, which stated that the assessment committee for Cardiff union (within which the parish was situate) on April 1865 duly approved a valuation list for the parish, in which list the appellants were rated upon their occupation of the wharf. On May 1867 a rate was assessed on the appellants according to this valuation list. The appellants, on the making of the rate (having previously given the proper notices), objected before the assessment committee, who declined to alter the amount at which the appellants were assessed. The appellants then appealed against the rate to the quarter sessions for Glamorgan, when the rate was confirmed, subject to a case for the opinion of the Queen's Bench. The overseers having made another rate in October 1867, the appellants (having previously given twenty-one days' notice of intention to appeal to quarter sessions to the overseers and the assessment committee of Cardiff union) applied to enter and respite the appeal against the second rate, on the ground that the case granted on the first appeal was not yet disposed of, and that the same question was at issue. It was objected that the appellants, after the making of the rate of October 1867, had not, so far as the rate appealed against was concerned, gone before or failed to obtain relief from the assessment committee of the union within which the parish was situate, and it was contended that a notice of objection should be given to the assessment committee against a valuation list as a condition precedent to an appeal against the rate to quarter sessions. The appellants, on their part, contended that the rate having been made on a valuation list in which the figures were the same as far as they were concerned, and which they had objected to before the assessment committee previous to an appeal against a former rate, it was unnecessary to give a fresh notice of objection to the valuation list and go again before the assessment committee.

Field and *Philbrick* for the respondents.

J. W. Bowen for the appellants.

The COURT (COCKBURN, C.J., MELLOR, J., LUSH, J., and HAYES, J.) gave judgment for the respondents, holding that the section required a fresh application to the assessment committee before there could be an appeal against a second rate.

Judgment for the respondents.

Queen's Bench. April 21. REGINA, ON THE PROSECUTION OF OWEN *v.* THE CAMBRIAN RAILWAYS COMPANY.

Lands Clauses Act—Mandamus to take up Award—Land not Injuriously Affected.

Mandamus to the defendants, stating that the prosecutor had an exclusive right to a ferry near Barmouth, that the company had built a railway bridge and a bridge for foot passengers over the river, and opened it to the public; that the prosecutor gave them notice of his interest in the ferry, and that it had been injuriously affected by their works, and claiming 1,700*l.* as compensation; that the company failed to pay the amount, or to enter into an agreement for that purpose; that the prosecutor appointed an arbitrator, and the company also appointed an arbitrator, without prejudice to their right to dispute the claim; that an umpire was duly appointed and made his award, but the company refused to take it up. The mandamus concluded by directing the company to take up the award, and furnish a copy to the prosecutor, or show cause to the contrary. Answer, that the ferry and the interest of the prosecutor therein had not, nor had either of them, been injuriously affected by the company's works, within the meaning of the Lands Clauses Act; and that the prosecutor was not entitled under the provisions of this Act to any compensation from the company.

Demurrer and joinder in demurrer.

Morgan Lloyd, in support of the demurrer, contended that, under the circumstances stated on the record, the company were bound to take up the award.

The COURT (COCKBURN, C.J., LUSH, J., and HANNEN, J.), without calling on *McIntyre*, for the company, gave judgment, and held that the answer was good.

Judgment for the defendants.

Queen's Bench. April 21. } Ashworth (Appellant), Heyworth (Respondent).

Local Government Act—Sales elsewhere than in Market—'Dwelling-Place or Shop'—Markets and Fairs Clauses Act, 1847 (10 *Vict. c.* 14, *s.* 13).

The Local Government Act (21 & 22 Vict. c. 98), s. 50, incorporates the provisions of 10 Vict. c. 14, so far as they relate to markets. By 10 Vict. c. 14, s. 13, after the statutory market-place is opened for use every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are authorised to be taken, is liable to certain penalties. A question in the present case was whether the appellant was liable to these penalties for exposing goods for sale upon the ground outside his shop, beneath a wooden shed affixed to the house and supported on wooden posts, and which had been erected and continued over the ground for a period of eighteen years. Previous to the erection of this shed stone flags had been built into and formed part of the house, and projected three feet from it. These flags still remained, and assisted in supporting the shed.

Crompton Hutton for the appellant.

Quain and *J. Kay* for the respondent.

The Court (Cockburn, C.J., Mellor, J., Lush, J., and Hayes, J.) held that the structure must be considered as part of a dwelling-house or shop within the exception in the statute.

Judgment for the appellant.

Queen's Bench. April 20, 23. } Dent and Others *v.* Smith.

Marine Insurance—British Ship Sold to Foreigners—Wreck—Salvage—Judgment of Foreign Court.

Special case stated for the opinion of this Court.

The plaintiffs, on behalf of the Finance Minister of the Sultan of Turkey, on November 26 effected an insurance with the defendant, in London, upon a quantity of gold for the ship Dutchman, which belonged to Waterford and was then in the port of London. The next day the owner of the ship sold her to a Russian company; an entry of the sale was made in the register at Waterford, but neither the plaintiffs nor the defendant knew of her being sold, nor of her name being changed from Dutchman to Dnieper, until the termination of the voyage. On December 4 the gold was put on board, and whilst the ship was proceeding on her voyage she grounded upon a shoal within the jurisdiction of the port of Constantinople. The gold was sent on shore in the ship's boat before any expense was incurred in respect of saving the cargo, and the ship ultimately became a total wreck. The gold was deposited under the care of the Russian Consul-General, as the ship was sailing under the Russian flag, and a Court was appointed by the Consul-General in pursuance of the practice at Constantinople to classify and determine the averages. The Court determined that the case was one which required a settlement of salvage, and it ordered that the gold should contribute the sum of 7,149*l.* 6*s.* 1*d.* towards the expenses of saving the cargo, although in fact the gold had been landed before any expenses had been incurred. The Court was duly appointed, and professed to act under the provisions of the French law, according to the usual practice at Constantinople in the case of a Russian ship. Under English law a great part of the sum of 7,149*l.* 6*s.* 1*d.* would not have been payable, nor would it have been so if the ship had at the time of her getting aground been sailing under the English flag. Under the judgment of the Court, it became necessary that the owner of the gold should pay the amount ordered by the Court, and this action was brought to recover back from the defendant his proportion of the amount so paid.

Watkin Williams (*English Harrison* with him), for the plaintiffs, contended that the change of nationality of the ship did not relieve the defendant from liability in respect of his proportion of that amount which the owner was obliged to pay in order to get possession of the gold. The ship was lost by the perils of the sea. The Court was duly appointed, and had competent jurisdiction to determine the question, and this Court could not say whether the question had been determined rightly or wrongly.

Sir G. Honyman (*Lodge* with him), for the defendant, contended that the action was not maintainable, by reason of the risk incurred by the defendant having been altered without his knowledge, by the change of nationality of the ship. The decision of the Court at Constantinople was plainly erroneous, and the owner ought not to have paid the money without endeavouring to obtain a reversal of the judgment by appealing to the Supreme Court of St. Petersburg.

Per curiam (Cockburn, C.J., Mellor, J., Lush, J., and Hayes, J.).—The plaintiffs are entitled to judgment. The gold got into the hands of the Russian authorities by reason of the ship being wrecked. The policy contained no express stipulation that the ship should remain an English ship, and no such stipulation can be implied. The Court which sat at Constantinople was lawfully appointed, and we cannot sit as a Court of Appeal upon its decision, nor can we say whether the decision is right or wrong. There is nothing to show that the owner would have acted prudently in appealing against the judgment.

Judgment for the plaintiffs.

Queen's Bench. April 24. } Regina *v.* The Metropolitan Board of Works.

Lands Clauses Act—Right to Compensation—Obstruction of Highway—Right of Taking Water—Injury to Trade.

Rule for a *certiorari* to remove into Court an inquisition verdict and judgment awarding compensation to Messrs. Batstones, of Ferry Street, Lambeth, in respect of two heads of claim. It appeared that the premises of the claimants consisted of a large pottery, about 150 feet from Ferry Street Dock. This dock was not a free dock, but there was a right of way for the inhabitants near the dock for the purpose of getting water from the river. This way had been stopped up by the Board in the execution of works under their compulsory powers, and the first head of claim was for injury to the trade of the claimants, who required the water in their manufactory. About 250 yards from the premises there was a free dock, called Broad Street Dock, and before the Board had commenced their operations, clay, coal, and sand were unloaded at this dock and carted to the claimant's premises. Since then the shore near the dock had been so altered that lighters could not get alongside, so that the former mode of conveyance was no longer available. This constituted the second head of claim.

Montague Chambers and *Bridgman* showed cause; and

Serjeant Parry and *Philbrick* supported the rule.

The COURT (MELLOR, J., HANNEN, J., and HAYES, J.) made the rule absolute, thinking that no compensation was recoverable, and that the case was governed by *Rickett* v. *The Metropolitan Railway Company*, 36 Law J. Rep. Q.B. 205, and *The King v. The Bristol Dock Company*, 12 East. 429.

Rule absolute.

Queen's Bench. April 24. } REGINA *v.* THE INHABITANTS OF LLANTRISSANT.

Poor-rate—Railway—Contributive Value.

Upon appeal by the Great Western Railway Company against a poor-rate for the parish of Llantrissant, the sessions reduced the rate, subject to a case, which stated that the Ely Valley Railway, consisting of a main line and two branches, formed a junction beyond the parish with the South Wales Railway. The branches were situated wholly and the main line chiefly in the parish, and the greater portion of the traffic, which is chiefly mineral, is brought by the Ely Valley Railway to the South Wales Railway, and conveyed for some distance over that line and other portions of the lines of the Great Western. The South Wales line is the property of the Great Western (the appellants), who are also occupiers of the Ely Valley Railway and branches under an agreement for a lease. The only question was whether the value of the traffic contributed by the Ely Valley line and branches, as bringing traffic to any portion of the Great Western line, was not to be taken into consideration in estimating the amount of the rate in the parish of Llantrissant.

Michael, for the respondents (the assessment committee of Pontypridd union and the overseers of the parish of Llantrissant), contended that the rent of the branch line would be enhanced by its value as a feeder to the line occupying it.

Field and *J. W. Bowen* for the appellants.

The COURT (MELLOR, J., HANNEN, J., and HAYES, J.) held that the case was governed by *Regina* v. *Haughley*, 35 Law J. Rep. M. C. 220, and that the contributive value could not be taken into account for the purpose of increasing the rateable value of the branch line.

Judgment for the appellants.

Common Pleas. April 20. } *Ex parte* GROOM.

Acknowledgment of Married Woman.

This was an application for leave to file the acknowledgment of a married woman. It appeared that she lived in one of the Hebrides, that there was great difficulty in going to the mainland, that there was no commissioner to take oaths in the island, and that the oath had been taken before a person who was sheriff, justice of the peace, and notary public.

Harington in support.

The COURT granted the application.

Exchequer. April 26, 28. } THE ECCLESIASTICAL COMMISSIONERS *v.* MERRALL.

Landlord and Tenant—Holding over—Contract with Corporation.

This was an appeal from a decision of the judge of the Westminster County Court.

The defendant became tenant of certain premises to the plaintiffs (who are a corporation having a common seal) for three years from March 25, 1863, by virtue of a written agreement, which provided that the rent should be paid quarterly, and that the premises should be put and maintained in tenantable repair by the defendant, and so delivered up by him at the end of his term.

The plaintiffs claimed 25*l.* for dilapidations. The agreement was not under seal. The defendant, however, entered and paid rent, and held the premises for two years after the expiration of the term, till his tenancy was determined by notice to quit on March 25, 1868.

It was contended, on behalf of the defendant, that the plaintiffs had no power to let, except by deed under their common seal, and that the above agreement was void, or, at all events, constituted nothing more than evidence of a yearly letting on such of the terms as are applicable to a yearly letting, and that the stipulations contained in the said agreement were such as could not be imported into a yearly letting, and that therefore the plaintiff must be nonsuited.

The Judge ruled that the defendant, during the last two years of his tenancy, was tenant from year to year, upon such of the terms of the agreement as were applicable to a yearly tenancy, and left it to the jury to say whether the defendant had complied with the stipulations in the agreement as to the repairs of the premises. The jury found a verdict for the plaintiffs for 15*l.*

The defendant thereupon appealed to this Court; and

Anstie now argued for the appellant.

Gates for the respondents.

The COURT (KELLY, C.B., BRAMWELL, B., PIGOTT, B., and CLEASBY, B.), following *Wood* v. *Tate* (2 Bos. and Pull. N. R. 247), gave judgment for the respondents.

Judgment for the respondents.

APPEAL FROM REVISING BARRISTER'S COURT.

Common Pleas. April 23. } TRENFIELD (APPELLANT) *v.* LOWE, (RESPONDENT).

Parliament—County Vote—Freehold for Life—2 Wm. IV. c. 45, s. 18—Actual Occupation—Rights of After Grass and Depasture.

The appellant claimed to be entitled to a vote for the Western Division of the county of Gloucester, in respect of an acre of land, with the possession of which he had been invested by the bailiff and bailiff burgesses of the town of Chipping Sodbury, according to an old custom of the place, by which the bailiff and bailiff burgesses (who have held for centuries a piece of land divided into eighty-one allotments, of about an acre each) have, whenever a vacancy has occurred, given possession of one of these acres to an inhabitant of the town by a ceremony of investiture, through which, by the delivery of a twig and turf, such inhabitant was invested with the acre, to hold the same for his life and the life of any woman that might be his wife and survive him, so long as he and his wife should reside in the town, subject and chargeable with all manner of waste, and also subject to the rules of the bailiff and bailiff burgesses respecting the entire

land. The acre so obtained is manured and mown by the holder, and the custom is for the bailiff and bailiff burgesses to grant the after grass to another inhabitant, with the right to depasture a cow for five weeks from September 10, and at the expiration of that time the whole of the allotments is thrown open to all the inhabitants to depasture until December 15, when it is closed, but manure may be taken out of the acres after the grass is cut and carried until August 1, and also from January 5 to February 14. The annual value of the acre is above 3*l.* and less than 5*l.* Each holder is rated to and pays the poor rates. The revising barrister decided that the appellant had not such an estate of freehold as would confer a county vote.

Pickering argued for the appellant.

Joshua Williams for the respondent.

The COURT (KEATING, J., and MONTAGUE SMITH, J.) held that the appellant took an equitable estate of freehold in the acre, and also that he was in the actual and *bonâ fide* occupation of such acre within the meaning of sec. 18 of 2 Wm. IV. c. 45, notwithstanding the rights of after grass and depasture given to the other inhabitants.

Decision reversed.

Court of Criminal Appeal.

Coram KELLY, C.B., BYLES, J., LUSH, J., BRETT, J., and CLEASBY, J.

Crown Case Reserved. April 24. } REGINA *v.* TAYLOR.

Indictment—Pleading—Misdemeanour—Conviction for Assault.

Case reserved by the chairman of the quarter sessions of the North Riding of Yorkshire.

The prisoner was convicted on an indictment for a misdemeanour, of which the first count was for unlawfully and maliciously wounding, and the second was for unlawfully and maliciously inflicting grievous bodily harm. The jury returned a verdict of guilty of an assault.

Shepherd appeared for the prosecution, and contended that the verdict was a lawful one, and the conviction right.

No counsel appeared for the prisoner.

The COURT held that both counts were for offences which necessarily included an assault, and were misdemeanours; and the verdict was a lawful one, and must have been taken.

Conviction affirmed.

Crown Case Reserved. April 24. } REGINA *v.* JENKINS.

Evidence—Admissibility of Dying Declaration.

Case reserved by BYLES, J.

The prisoner was convicted of the murder of Fanny Reeves at the last Bristol Assizes, but the case rested on the dying declaration of the deceased woman. As to this, it appeared that on October 16 the deceased was rescued from the water of the river Avon in an exhausted condition between eight and nine o'clock at night. She continued very ill, and became, according to the medical evidence, in great danger. On the next day she said she did not think she should get over it, and desired that some one should be sen to pray with her. A neighbour accordingly prayed with her, and talked seriously to her. At ten o'clock the same evening the magistrates' clerk came, and found her in bed breathing with considerable difficulty, and moaning occasionally. He took her statement, and before the completion of it asked her if it was with the fear of death before her she made her statement, and if she had any present hope of recovery. She said none. He asked if she felt she was likely to die; she said, 'I think so.' He asked why, and she replied from the shortness of her breath. Her statement was put into writing. After the narrative of the facts, and towards the close of the statement, the clerk inserted, 'From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope of my recovery.' As soon as the statement was completed the clerk read it over to her, and asked her if it was correct. She said that he had left out the words 'at present,' and that she wished to have them added, which the clerk accordingly did, by inserting the words after the word 'hope,' so as to make it read 'with no hope at present' of my recovery. The question reserved was whether under these circumstances the declaration was admissible.

Collins (*Norris* with him) argued for the prisoner that it was inadmissible.

Saunders (*Paley* with him) for the prosecution that it was properly admitted.

The COURT held, that under the circumstances the effect of the words 'at present,' coupled with the request of the woman to have them inserted, was that she was not in a state of such settled hopeless expectation of death as must exist to make her dying declaration admissible; and the declaration was therefore improperly received in evidence on the trial of the prisoner.

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Courts of Equity.

Lord Hatherley, L.C. } Lewis *v.* Fothergill.
April 21, 28, May 5.

Coal Mine—Lease—'Working in a Proper and Workmanlike Manner.'

The question raised on this appeal was whether the defendants, iron masters trading under the firm of the Plymouth Iron Company, had been working coal mines, agreed to be demised to them for ninety-nine years by the plaintiff under an estate belonging to him near Merthyr Tydfil, in a proper and workmanlike manner. The lessees were in the occupation also of other mines under an adjoining estate, and they had proceeded to work the coal under the plaintiff's land by means of 'dip-headings,' or 'instroke' from these neighbouring works. The plaintiff contended that the only proper and workmanlike mode of working was to have sunk pits on his land; and by his bill he prayed for an injunction against the mode of working they had, in fact, adopted, and for other relief. Vice-Chancellor James having, on January 21, dismissed the plaintiff's bill with costs, he appealed.

Mr. Jessel, *Mr. Kay*, and *Mr. Marten* were for the appellant.

Sir R. Palmer, *Mr. Amphlett*, and *Mr. Freeling*, for the defenders, were not called upon.

The Lord Chancellor (May 5) dismissed the appeal with costs. The simple question, he said, was whether or not the working by instroke was proper and workmanlike. But the evidence, including that of the plaintiff's late agent, he was of opinion, showed that, although it would perhaps have been most advantageous for the plaintiff that the working should have been by pits sunk on his land, the mode actually adopted was not improper and unworkmanlike under the agreement.

Lords Justices. } *In re* The Mercantile Trading
April 27. } Company. Stringer's Case.

Company—Winding-up—Jurisdiction of the Court under the Companies Act, 1862, *ss.* 101, 165—*Payment of Dividend out of Capital.*

This was an appeal by the official liquidator against the decision of Vice-Chancellor Malins, noted *antè* p. 78.

Mr. Cotton and *Mr. Higgins* for the appellants.

Mr. Glasse and *Mr. Jackson* for the respondent, Mr. Stringer.

Their Lordships differed from the opinion of the learned Vice-Chancellor on the question of jurisdiction, thinking that either of the sections of the Act upon which the appellant relied were sufficient to give the Court jurisdiction in a case such as the present. But as they also differed from the view taken by His Honour on the merits of the case, inasmuch as they held that the dividend in question was to be supported as having been *bona fide* made out of fairly estimated profits, the appellant failed, and the appeal was dismissed with costs.

Lords Justices. } Dear *v.* Verity.
April 29.

Written Agreement to Grant a Lease—Parol Variation—Specific Performance.

This was an appeal by the defendants from a decision of Stuart, V.C., decreeing specific performance of an agreement for a lease. The case is reported 38 Law J. Rep. (N.S.) 297.

Mr. E. K. Karslake and *Mr. Rowcliffe* for the appellants.

Mr. Greene and *Mr. Cottrell*, for the respondents, were not called upon, and

Their Lordships dismissed the appeal with costs.

Lords Justices. } *In re* The Land Credit Company
April 30. } of Ireland. *Ex parte* Overend, Gurney & Co.

Company—Validity of Bills of Exchange.

The question in this appeal related to the validity of a claim made by the firm of Overend, Gurney & Co., against the estate of the Land Credit Company, upon bills of exchange for sums amounting to 158,000*l.* These bills were accepted by Lord Fermoy, the chairman, on behalf of the company, acting under a resolution which had been duly passed by the board of directors, authorising an advance to be made of 337,000*l.* to one D. L. Lewis, upon his depositing securities of the Cork and Youghal Railway of the nominal value of double that amount.

The bills in question were accepted and given to Lewis when only a portion of the securities had been deposited, and on this ground it was contended that the bills did not bind the company. A case was attempted to be made against Overend, Gurney & Co., that they were cognisant of the fact that the bills had been improperly obtained by Lewis; but in the opinion of their Lordships this failed, and Overend, Gurney & Co. must be taken to be *bona fide* holders for value without notice of any fraud. The question turned a good deal upon the mode in which, under the articles of association, bills were to be accepted. One of the objects of the company, as stated in the memorandum of association, was to accept bills. The Master of the Rolls having admitted the claim, the official liquidator appealed.

Mr. Jessel, *Mr. Huddleston*, and *Mr. Martineau* for the appellant.

Sir R. Palmer, *Mr. Kay*, and *Mr. Lindley* were for the firm of Overend, Gurney & Co.

Mr. Karslake and *Mr. Higgins* appeared for Lord Fermoy, but were not allowed to address the Court.

Their Lordships held that the bills were drawn under such circumstances that it was not competent for the company to dispute their validity as against *bona fide* holders for value, which they considered the firm of Overend, Gurney & Co. were. The appeal was therefore dismissed with costs.

LORD ROMILLY, M.R. April 23, 26. } GRAHAM *v.* JOHNSON.

Bond — Assignee — Subsisting Equities — Forbearance to Sue — Consideration for Promise.

The plaintiff, a cavalry officer, had been in the habit of assisting the defendant Johnson, a barrister practising in India, by accepting bills of exchange, Johnson having done similar service for the plaintiff, and also given him legal advice. The plaintiff was then persuaded by Johnson to give him a bond for 1,000*l.*, accompanied by a letter stating that it was intended as a return for this assistance and advice, but he executed the bond believing that it was intended only to enable Johnson to raise money, and without knowing the character of the instrument; and he received the assurance of Johnson that he would not be compelled to pay anything.

This bond was afterwards assigned by Johnson for full value to the defendant, Colonel Barlow, who sued the plaintiff upon it; and the present bill was filed to restrain the proceedings at law and to have the bond delivered up.

Before the action at law was commenced, the plaintiff being under the impression that he had no defence to the proceedings threatened, wrote to the solicitors of Colonel Barlow, promising to pay the money at a definite time if they forbore to sue him. They did forbear until after the appointed time had elapsed, and the question arose whether, supposing Colonel Barlow's case, as assignee of the bond, to fail, this forbearance was a sufficient consideration to support the promise.

Mr. Southgate and *Mr. Cates* were for the plaintiff.

Mr. Cracknall for the defendant Johnson.

Mr. Jessel and *Mr. Hemming*, for Colonel Barlow, argued that the bond being given to enable Johnson to raise money, the plaintiff was liable, as he would have been under a negotiable security given without consideration.

The MASTER OF THE ROLLS held—(1) That by reason of the circumstances under which the bond was given, equity would restrain the obligee from enforcing it; (2) That the purpose for which it was given, not being expressed on the face of it, did not alter the character of the instrument, and that Colonel Barlow took it subject to the equities subsisting between Johnson and the plaintiff; (3) That Colonel Barlow thus having no right to sue upon it, his forbearance did not constitute a consideration sufficient to support the promise.

LORD ROMILLY, M.R. April 26. } LLOYD *v.* LLOYD.

Gift of Residue upon Trust to continue Investments — Held to include Realty.

Edward Lloyd by his will, made in 1863, after making certain devises and bequests, gave 'all his other property whatsoever and wheresoever' to trustees upon trust to continue the same in the investments on which it should be standing at his death, or at their discretion to call in the same and invest it in their names on Government or real securities, or debentures of railways or municipal corporations, and to dispose of the income thereof as therein mentioned. The question was whether the testator's residuary realty was included in this gift.

Sir R. Baggallay, *Mr. Jessel*, *Mr. Brodrick*, and *Mr. Babington* for the parties interested.

Lord ROMILLY was of opinion that the gift extended to the realty, and made a declaration accordingly.

LORD ROMILLY, M.R. April 27. { *In re* THE NATIONAL PROVINCIAL MARINE INSURANCE COMPANY (LIMITED).

Companies Act, 1862 — *Contributory — Transfer to an Infant — Signature of Infant's Name by Father to Transfer.*

John Richardson and Thomas Richardson in December 1866 sold, through a broker in the usual manner, fifty shares in the above company, of which they were then the registered owners. When the transfer day arrived the purchaser's broker gave the name of Charles Maitland as the buyer, and the transfer was executed in that name, and duly registered. The company having since been ordered to be wound-up, Charles Maitland was put on the list of contributories in respect of the fifty shares. It appeared, however, that at the date of the transfer and the order to wind up Charles Maitland was an infant, that the shares had been purchased and paid for by his father, John Dundas Maitland, and that the latter had signed his son's name to the transfer; and the liquidator now applied to have Charles Maitland struck off the list of contributories, and the Messrs. Richardson or John Dundas Maitland put on instead.

Mr. Southgate and *Mr. Bagshawe* for the liquidator.

Sir Richard Baggallay and *Mr. Lawson*, for Messrs. Richardson, contended that John Dundas Maitland was the real purchaser, and had used the name of his son to escape liability.

Mr. Jessel and *Mr. Ince* for John Dundas Maitland.

LORD ROMILLY, M.R.—It is clear that I cannot put John Dundas Maitland on the list, and I am of opinion that I must put the Messrs. Richardson on, but without prejudice to any proceedings they may take at law or in equity against John Dundas Maitland. The liquidator alone must have his costs out of the estate.

LORD ROMILLY, M.R. April 19, 20, 27. } *In re* SMITH, KNIGHT & Co. (LIMITED). GIBSON'S CLAIM.

Companies Act, 1862 — *Adoption by Company of Debt — Payment of Interest.*

The above company was formed, in April 1864, for the purpose of purchasing the business and effects of Smith & Knight, who were railway contractors. Before the formation of the company, the applicant had lent to Smith & Knight certain sums, the repayment of which was secured by their promissory notes and by a deposit of railway shares, and Smith & Knight had opened an account with the applicant's firm, who are bankers. It appeared that, in August 1864, the applicant continued to treat Smith & Knight as his debtors. After some correspondence between the applicant's firm and the company as to the payment of the interest on the sums which had been advanced to Smith & Knight, the company, in February 1866, paid the interest, and they at the same time requested the applicant's firm to transfer the balance standing to the credit of Smith & Knight to a new account, to be opened in the name of the company, and to close the account of Smith & Knight, and this was done. The company had since been ordered to be wound up, and the applicant now sought to be allowed to prove against the company for the sums he had advanced to Smith & Knight.

Mr. Jessel and *Mr. Chitty* for the applicant.

Sir Richard Baggallay and *Mr. Westlake* for the liquidator.

Lord Romilly thought that the payment by the company to the applicant's firm of the interest on the debt, coupled with the instructions to close the account of Smith & Knight, and to open a new account in the name of the company, showed that the company considered the applicant to be their creditor, and that he had established his claim. The costs of the applicant and of the liquidator to come out of the estate.

Lord Romilly, M.R. May 1. } *In re* Lush's Trusts.

Married Woman—Assignment of Reversionary Interest by Coercion of Husband—Fraud—Equity to Settlement.

This was a petition by the Law Reversionary Interest Society for payment out of Court of a fund which had been paid in under the Trustee Relief Act. The question was whether Mrs. Bowren, one of the respondents, was entitled to her equity to a settlement out of the fund. Mrs. Bowren was, at the date of her marriage, entitled in reversion to the fund in question. No settlement affecting it was made on her marriage. Shortly after the marriage, Mrs. Bowren, under the coercion and at the dictation of her husband, Edward Bowren, who was in want of money, wrote out a document which purported to be made two days before the marriage, and to assign to Bowren absolutely all her before-mentioned reversionary interest. This document she signed in her maiden name. The husband then sold, or pretended to sell, the reversion to one Collins, against whom a decree for specific performance of the contract was shortly afterwards obtained by collusion. Bowren then, with the consent of Collins, sold the reversion to the petitioners for a full consideration. The tenant for life of the fund died recently. Bowren had not been heard of since 1861.

Mr. Jessel and *Mr. H. F. Bristowe*, for the petitioners, contended that as Mrs. Bowren had, by writing and signing the pretended assignment to her husband, been a party to a gross fraud, she was not entitled to a settlement out of the trust fund.

Sir R. Baggallay and *Mr. E. Cutler*, for Mrs. Bowren, were not called on.

Mr. Busk for the trustees.

Lord Romilly, M.R., thought that Mrs. Bowren was not bound by the document which she had signed by the coercion of her husband. The petitioners had only purchased what the husband could sell. Mrs. Bowren must have the interest of the fund for her life, and the costs of all parties must be allowed out of the fund.

Stuart, V.C. April 22. } *In re* The Continental Bank Corporation (Limited). Castello's Case.

Winding-up—Contributory—Infant Transferee—Companies Act, 1862, *s.* 131.

Castello, a holder of ten shares in the above-named company, on July 25, 1865, transferred them to one Quihampton, then an infant. On August 7, 1865, a resolution was passed to wind up the company voluntarily, which was confirmed on August 23, 1865, the transfer to Quihampton having been meanwhile registered on the 14th of that month.

Quihampton attained twenty-one on October 5, 1865, and the voluntary winding-up proceeded until June 11, 1866, when an order was made to wind up the company compulsorily. The official liquidator, finding Quihampton's name upon the register, and assuming him to have been of full age, made a call upon him, which Quihampton offered to compromise, but he declined to repudiate the transfer. It appeared that the company were not aware at the time of registration that Quihampton was an infant.

Mr. Hardy and *Mr. J. N. Higgins* now moved, on behalf of the official liquidator, that the name of Quihampton might be removed from the list of contributories, and that of Castello substituted for it. Section 131 of the Companies Act, 1862, provided that, whenever a company is wound up voluntarily, any alteration in the status of its members taking place after the commencement of the winding-up shall be void. They contended that, unless there was at the time of the winding-up a transferee who was capable of taking a transfer, the liquidator had a right to resort to the transferor. Here the status of the transferee at that time was that of an infant, and could not be afterwards altered.

Mr. Dickinson, for Castello, contended that the real winding-up commenced from the date of the compulsory order.

Stuart, V.C., held that the winding-up commenced from the date of the resolution to wind up voluntarily; and as Quihampton was then an infant, there could, according to section 131 of the Act, be no alteration in his status after that time, and his subsequent acts must be treated as the acts of an infant. His name must be taken off the list, and that of Castello substituted for it.

Stuart, V.C. April 23. } *In re* Wilkinson's Settlement Trusts.

General Power of Appointment—Will—Gift of Pecuniary Legacies—Effectual Exercise of Power—Wills Act, s. 27.

Miss Anne Wilkinson, having a general power of appointment over certain trust funds comprised in a settlement, and being possessed of no other property, by her will, which was dated November 15, 1848, and which contained no reference to the power, bequeathed three pecuniary legacies; and as to the residue of her property, the testatrix gave and bequeathed the same, subject to the payment of her just debts, funeral and testamentary expenses, to her two sisters, equally between them. The funds subject to the trusts of the settlement having been paid into Court under the Trustees Relief Act, and Anne Wilkinson having died without ever having exercised her power of appointment, except so far as her will operated as an exercise thereof, the principal question now argued was whether the gift of the pecuniary legacies was a valid execution of the power of appointment within section 27 of the Wills Act, or whether the residuary legatees were entitled, to the exclusion of the pecuniary legatees.

Mr. Dickinson, *Mr. F. C. J. Millar*, and *Mr. Thomas Hughes*, for the residuary legatees, contended that the Legislature in section 27 of the Wills Act never contemplated any piecemeal exercise of a power, and that if the gift of the pecuniary legacies standing alone was not a good exercise of the power, those legacies must be swept out of the will, and the residuary legatees treated as entitled to the whole.

Mr. Greene and *Mr. Cookson*, for the pecuniary legatees, were not called upon.

Stuart, V.C., after saying that he was satisfied with

the soundness of his decision in *Hawthorn* v. *Shedden*, 3 Sm. & Giff. 293, held that the gifts of the pecuniary legacies in question were an effectual exercise of the testatrix's power of appointment within section 27 of the Wills Act.

STUART, V.C.
April 29, 30.
May 1.
HARRINGTON *v.* HARRINGTON.

Infant—Wrongful Act—Administration of his Estate—Tenants' Claim for Damages occasioned by Rabbits.

This was an application on behalf of eight tenants of the estates (which were now being administered by the Court) of the late Earl of Harrington, for several sums, amounting in the aggregate to 1,305*l.* 9*s.*, for damages done to their farms by rabbits turned on to them by him in 1863.

The facts of the case are very shortly these:—The late infant earl succeeded to the title and estates, as tenant in tail thereof, on September 7, 1862. At that time the tenants held their farms as tenants from year to year, with a verbal understanding that they were to preserve the game upon them. In 1863, by direction of the earl, twelve hampers of live rabbits were turned on to the farms. Lady Harrington, the mother of the earl, was his guardian, and a receiver had been appointed in the cause. In 1864 the rabbits, which had then increased enormously in number, did great damage to the crops on the farms. The tenants complained to the earl and the receiver in the cause. An arrangement was proposed, by which valuers should be appointed, on behalf of the earl and of his tenants, to assess the amount of damage done by the rabbits; and further that the tenants should be allowed to deduct the amount from their rents due next after the assessment should have been made. In 1865 the matter came before the judge in Chambers, when it was directed to stand over till the earl, who was then within a few months of twenty-one years of age, should have attained his majority. In the meantime, however, viz. in 1865, 13,000 rabbits were destroyed, and part of them sold for about 600*l.* That amount was paid to the receiver in the cause. The earl died an infant in 1866, and Lady Harrington, as his legal personal representative, called upon the tenants to pay, and compelled them to pay to her their full amounts of rent, without allowing anything for the sums which, they insisted, the receiver and the earl had said would be a fair and reasonable allowance for the damage done by the rabbits. The tenants claimed for injuries in 1863, 1864, and 1865. The chief clerk had disallowed the claims; and this application was by way of appeal from that ruling, for an order to vary the certificate, by allowing them.

Mr. Dickinson and *Mr. Cracknall* appeared for the tenants.

Mr. E. K. Karslake and *Mr. C. Hall*, for Lady Harrington, were not called upon.

STUART, V.C., said the difficulty which the applicants had in supporting this motion arose from the unfortunate circumstance of the death of the late earl while still an infant. The application now before the Court was virtually the renewal of one made in Chambers during his life; and when it was then made the Court thought the amounts claimed by the tenants for the injury inflicted by the rabbits were preposterous. In some cases it was more than half-a-year's rent. It appeared then, however, that such a case was in fact made as that when the earl came of age he might, and, at the recommendation of the Court, would most probably deal liberally with the tenants, and make them compensation. With a view to that, and considering that the earl was then only a few months under his full age of twenty-one years, the matter was left to abide his kindly consideration. Unfortunately, his premature death defeated the intention with which the claims were suspended; and what the Court had now to determine was, not what a sensible landlord would do for his tenants under the circumstances, but a very different question—namely, whether these tenants were creditors of the estate of the late infant earl for any amount in respect of the damages done by the rabbits? There was no case in which this Court had been called upon to deal with a claim for unliquidated damages for a wrong or a breach of contract. It always required the strictest evidence of the amount claimed. Here it was not easy to say whether the claims were put forward as damages *ex delicto*, or as a debt *ex contractû*. If they were based upon the latter ground, it was impossible to see how the tenants could maintain them. What was there here to establish anything like a foundation for a contract? The only facts showing that appeared to be, that when the 13,000 rabbits were killed, some of them were sold for about 600*l.* It was not much pressed in the argument, but it might have been said that, as the estate of the late earl was enriched to that extent, it ought to be so far made liable. But there really was no ground for that contention here; nor was it possible on the evidence to see how damages, generally, could be recovered, with respect to the amount of the rabbits put on the farms. In 1863 there were twelve hampers full of live rabbits turned on; but nothing to show the actual number. Then, again, Lady Harrington stated in her affidavit that when she, as the legal personal representative of the late infant earl, was applied to by one of the tenants, she, who was also his guardian during his minority, gave that tenant leave to kill the rabbits. That tenant had withdrawn from the present application. But the circumstance of the leave having been given was an unfavourable one to the case of these claimants; and as nothing existed which, in point of law, was binding on the estate of the late earl, the motion must be refused. If, during the infancy of the earl, the Court had been asked whether, having regard to his position as landlord, it was for his benefit to allow the compensation asked for, it might have been studious to see what could be allowed. There was, however, nothing, either at law or in equity, to bind the earl's estate, and the motion must, as already stated, be refused, but without costs.

MALINS, V.C.
May 1.
In re CHELTENHAM AND SWANSEA RAILWAY CARRIAGE AND WAGGON COMPANY (LIMITED).

Company—Winding-up—Companies Act, 1862, *s.* 79—*Compromise—Cancellation of Shares—Costs—Charge of Fraud.*

The facts were shortly as follows: Shackleford, Ford & Co., an old-established and apparently prosperous firm, doing business at Cheltenham in carriage and waggon making, being anxious, as they alleged, to enlarge their operations by means of increased capital, converted themselves in 1866 into a limited company under the style of the old firm, with a capital of 200,000*l.* in 20,000 shares of 10*l.* each. The old firm turned out to be insolvent; the partners, as managing directors of the com-

pany, misappropriated funds to the amount of 24,000*l.*; a committee of investigation was appointed in May 1867, by whom a scheme of compromise and reconstruction was formed, in accordance with which certain shares were cancelled by arrangement with their holders. A circular was then sent to the shareholders, asking each individually whether he would retire or remain in the company on the terms of the compromise. The reconstituted company adopted the name of the Cheltenham and Swansea Railway Carriage and Waggon Company (Limited), and continued its business in a more satisfactory manner. The petitioner, the Rev. William Johnston, held ten shares in the company, with 8*l.* paid on each share; he had received the circular, and had been at first put down among the retiring shareholders, but at his own request the mistake had been corrected, and he was entered as a continuing shareholder. Subsequently, however, his difference with the directors was renewed, and in February last he presented this petition for winding up the company.

Mr. Glasse and *Mr. N. Higgins*, for the petitioner, contended that the management and conduct of this company was such that it ought no longer to continue; that it was kept up for the sake of the Gloucestershire Banking Company, who were large creditors. Moreover, the so-called compromise was *ultra vires*; it was a reduction of capital, and if the company were now wound up the directors could be made liable for the loss thus incurred by the company under the recent decision in *Stringer's case* (Lords Justices), April 28, 1869.

Mr. J. Pearson and *Mr. Eddis*, for holders of 624 shares, in support of the petition. The compromise was utterly ineffectual, and the arrangement invalid, *Spackman's Case*, 37 Law J. Rep. Chanc. 752; s.c. L. R. 3 H. L. 227.

Every meeting since the alleged cancellation of shares had been irregular in consequence of the absence of the holders of these shares, and therefore incapable of doing any legal act; it might therefore be said that the company had done nothing for the two past years, and ought on that account to be wound up.

Mr. Cotton and *Mr. Millar* for the company.

Mr. Jessel and *Mr. F. H. Colt* for the directors.

Mr. Winterbotham for the principal creditor, the Gloucestershire Banking Company, and

Mr. G. Hastings, for holders of 8,253 shares, were not called upon.

The Vice-Chancellor, after examining the evidence as to the ability of the company to pay its debts, held that the petitioner had been a party to the reconstruction in 1867, on the terms of the compromise then entered into, and that he could not go behind that. Since that date no money had been borrowed, no action had been brought or threatened, and all obligations had been met. Further, the company, though making no dividends, was improving; it employed 250 men, it paid wages to the amount of 1,000*l.* per month, and it was executing several important and lucrative contracts. He could not, therefore, declare that the company was unable to meet its engagements, or that in his opinion it was 'just and equitable that it should be wound up.' The only two possible grounds under section 79 of the Companies Act, 1862, therefore failed. As to the improper cancellation of shares, that might be ground for proceedings against the holders of the cancelled shares or other persons, but was no ground for winding up the company. The petition must be dismissed with costs as against the company, and also as against the directors, who had been charged with direct fraud, and were therefore entitled to appear separately from the company. The bank was also directly charged with fraud, and might be said to come under the same rule, but the jurisdiction of the Court in the matter was doubtful, and the bank must pay its own costs.

Malins, V.C. May 4. } Mid-Wales Railway Company *v.* Cambrian Railway Company.

Demurrer—Concurrent Jurisdiction.

The plaintiff and defendant companies, together with the Milford Company, were jointly possessed of a station at Llanidloes under the provisions of the Llanidloes and Newton Act, 1862. The Act provided that the three companies should have equal rights to the station and its appurtenances, and should appoint officers and frame rules jointly. The bill charged that the defendant company had virtually taken the entire management of the station into its own hands, had solely appointed a station-master, and had refused to the plaintiff company the use of a convenient siding for the purpose of discharging their coal, and generally had issued orders in contravention of the equal rights of the plaintiffs. The bill prayed for a declaration of rights of the plaintiff company in the station, and for an injunction.

The defendant company demurred generally for want of equity.

Mr. Mackeson and *Mr. Fry*, for the demurrer, argued that the plaintiffs were trying to make use of the machinery of this Court to settle differences for which there was an existing tribunal pointed out by their statute and set forth in the bill; they should have called for the appointment of a joint committee of the three companies; the plaintiff's grievance was not such as could not be remedied without the intervention of this Court.

Mr. Osborne and *Mr. Dryden*, for the plaintiff company, were not called upon.

The Vice-Chancellor said the concurrent jurisdiction established by the statute would not oust the original jurisdiction of the Court without express words. Where, on the face of the bill, no relief could be given, it was clear the defendant must demur, or lose his costs at the hearing. But before applying this rule, the Court must be certain that relief cannot be obtained at all before this Court, or with equal speed before another tribunal. In this case the defendants had clearly put the plaintiffs to inconvenience; and if he allowed this demurrer, and relegated the matter to the decision of a joint committee as suggested, they might further harass them and cause loss of trade and detriment by refusing to concur in the appointment of a committee. An immediate remedy was evidently required here; the demurrer must be overruled, and the bill answered.

James, V.C. April 26. } *Re* The London Marine Insurance Association. *Ex parte* Smith.

Mutual Insurance Society—Unstamped Policy.

This was a case which arose in the winding-up of a Marine Insurance Association formed on the mutual principle—that is, a person desiring to insure communicated with the committee of the association, and in due course received a policy by which he became entitled to compensation in respect of a loss happening to himself, and liable to contribute in respect of a loss to any one of his fellows.

The applicant being desirous of insuring a vessel, in accordance with the regulations of the association, on September 6, 1864, signed an authority, addressed to 'J. H. and to the Secretary or Manager for the time being,' authorising them to insure the vessel in the above association, acknowledging himself a member of the association, and authorising them, on his behalf, to underwrite policies issued to his fellows, and the applicant undertook to abide by the rules of the association. Soon afterwards the applicant received a policy which was not stamped. On July 1, 1865, an order was made to wind up the company, and the applicant's name was settled on the list of contributories on December 21, 1866, in respect of the period from September 6, 1864, to July 1, 1865; and on January 16, 1867, he sent in a claim to rank as a creditor in respect of a loss. By the affidavit in support of his claim, he stated that he became a member of the association in September 1863.

On February 15, 1869, the applicant took out a summons to have his name removed from the list of contributories, which now came on for hearing in Court.

Mr. M'Naghten, for the summons, contended that the policy being void for want of a stamp, the applicant never became a member of the association.

Mr. Eddis and *Mr. Lindley*, for the official liquidator, contended that without looking at the unstamped policy, the facts above stated showed a contract on the applicant's part to become a member of the association.

James, V.C., held that according to the rules and principles of the association no one became a member unless he received a valid policy, and that as the policy given to the applicant was void, his name must be removed from the list.

Courts of Common Law.

Queen's Bench. (*Magistrates' Case.*) April 28. } Regina *v.* The Overseers of Maldon.

Poor-Rate—Supplemental Valuation List—Rateable Hereditaments—25 & 26 *Vict. c.* 103.

By 25 & 26 Vict. c. 103, s. 14, the overseers of parishes in unions are, from time to time, to make a list of all the rateable hereditaments in such parishes, and by section 25, when any property not included in the valuation list in force in any parish becomes rateable, or where, by reason of any alteration in the occupation of any property included in such list, such property becomes liable to be rated in parts not mentioned in such list as rateable hereditaments, and separately valued therein, and when and so often as it shall appear to the overseers that any rateable property included in such list has been increased or reduced in value since the valuation thereof, whether by building, destruction of building, or other alteration in the condition thereof, or otherwise, the overseers of the parish are to make a supplemental valuation list, showing the annual rateable value, according to the judgment of the overseers of the property so become rateable, or of the parts so become liable to be rated separately, or of the property so increased or reduced in value, as the case may be. By section 26 the assessment committee, upon the application of any person aggrieved by the valuation list in force in any parish, may direct a new valuation of all or any of the rateable hereditaments in such parish, and a new valuation list in substitution for such valuation list as aforesaid, or a supplemental list in substitution for any part thereof or in addition thereto, &c.

Upon appeal by the overseers of the parish of Maldon against the supplemental or other valuation lists relating to the rateable hereditaments for the parish, the sessions dismissed the appeal, subject to a case which stated that one of the inhabitants of the parish had erected upon land belonging to him five houses, and that the overseers of the parish returned a supplemental valuation list to the assessment committee of the union to which the parish belonged, in which list no mention was made of these houses. At the time when the list was returned, the houses were completely finished and ready for occupation, but had never been let or occupied. The assessment committee altered the list by inserting in it the five unoccupied houses, and thereby raised the rateable value of the parish by the sum of 425*l.* The question for the Court was whether this alteration was right.

Bush Cooper (*Edward Clarke* with him) for the appellants; and

Field (*Thesiger* with him) for the respondents.

The Court (Lush, J., Hannen, J., and Hayes, J.) held that the case was not distinguishable from *Regina* v. *Hammersmith*, 33 Law Times, 183, a decision upon the County Rate Act. 'Rateable hereditaments' must include property in its nature liable to be rated, whether actually occupied or not.

Judgment for the respondents.

Queen's Bench. April 29. } Walker *v.* The Lord Mayor and Commonalty and Citizens of the City of London.

Writ of Restitution—Conviction for Felony—City of London—Jurisdiction of Court of Queen's Bench—24 & 25 *Vict. c.* 96, *s.* 100.

Rule calling upon the Lord Mayor and commonalty and citizens of the city of London to show cause why a writ of restitution should not issue to restore to John Walker certain moneys amounting to 270*l.*, the proceeds of the sale of certain goods stolen from the said John Walker between the night of Saturday, February 4, and the morning of Monday, February 6, 1865.

It appeared from the affidavits that between the above mentioned dates the shop of John Walker had been burglariously entered and a large quantity of watches, sovereigns, and bank-notes stolen therefrom. Subsequently certain persons were convicted of the burglary, and it was stated that the sum for which restitution was now sought, and which was found in the house where

such persons lived, was the proceeds of the sale of the stolen property. The 270*l.*, after the conviction, came into the possession of the authorities of the city of London, and they declined to give it up to John Walker, claims being made upon them by other persons in respect of it.

Mellish and *Archibald* showed cause against the rule, contending that this Court had no jurisdiction to make the order. Under the common law it was necessary to bring an appeal of robbery before the goods could be obtained. That necessity was removed by 21 Hen. VIII. c. 11, which gave power to justices of gaol delivery, as other justices, to award writs of restitution. Similar power was given by 7 & 8 Geo. IV. c. 29, s. 57, and by 24 & 25 Vict. c. 96, s. 100, but no such power was given to the Court of Queen's Bench.

The *Solicitor-General* (*Sir J. D. Coleridge*) and *Crompton Hutton* supported the rule.

Per Curiam (Mellor, J., Lush, J., and Hannen, J.).—At common law, where there had been an appeal of robbery, this Court had power to award a writ of restitution; but such appeals were abolished by 59 Geo. III. c. 46. There is no proceeding before the Court in this matter, nor is any power given by the statutes except to the Court before which the offender is tried. There is, therefore, no jurisdiction to make the order which is asked for.

Rule discharged.

Queen's Bench. May 1. } Leverson *v.* Regina.

Central Criminal Court—Jurisdiction—Judge of the City Small Debts Court—Several Courts Sitting at the Same Time.

This was a writ of error by which three questions were raised. First, whether, under the Central Criminal Court Act, 4 & 5 Wm. IV. c. 36, it was necessary that the same two judges should sit throughout the trial of persons indicted and tried at the Central Criminal Court. Secondly, whether more than one Court could lawfully sit at the same time. Thirdly, whether the judge of the City Small Debts Court had jurisdiction to sit as a judge for the trial of prisoners.

Mellish (*Gibbons* with him) argued for the defendant.

The *Solicitor-General* (*Sir J. D. Coleridge*), *Poland* and *Archibald* with him, argued for the Crown.

Per Curiam (Cockburn, C.J., Mellor, J., Lush, J., and Hayes, J.).—Upon the second and third points there must be judgment for the Crown, but on the first point we will take time to consider.

Judgment accordingly.

Queen's Bench. May 3. } Regina *v.* Sir Travers Twiss.

Burial Ground—Faculty to Disturb Consecrated Earth—Prohibition.

Rule for a prohibition to restrain the judge of the Consistory Court of London from granting a faculty authorising the erection of buildings on a burial ground. The burial ground was consecrated in 1778. In 1865 an order in council was made under 15 & 16 Vict. c. 85, that burials in this ground should be discontinued, and it was admitted that no burials had taken place there for a period of forty years. The guardians of the parish having erected buildings forming part of the workhouse on the ground in question, petitioned the Consistory Court for a faculty authorising the desecration of the soil. The buildings so erected included a chapel.

Barnard, *G. Tayler*, and *R. A. Pritchard* showed cause.

The *Solicitor-General* (*Sir J. D. Coleridge*) in support of the rule.

The Court (Cockburn, C.J., Hannen, J., and Hayes, J.) discharged the rule. The Court desired fully to recognise the principle that ground once consecrated for burial or other sacred purposes could only be applied to secular purposes by Act of Parliament. It could not be said, however, that the Ecclesiastical Court was utterly without jurisdiction, as the petition asked that the erection of the chapel might be authorised. It appeared also that the applicant was a mere stranger to the parish, and was therefore not entitled as of right to a prohibition.

Rule discharged.

Queen's Bench. May 4. } De Rosay *v.* The Anglo-Italian Bank (Limited).

Joint-stock Company—Winding up—Formation of New Company—Dissentient Shareholder—Arbitration—Action—Common Law Procedure Act, 1854—*The Companies Act*, 1862 (25 & 26 *Vict. c.* 89) *ss.* 161, 162.

Cross demurrers to a declaration and a plea.

The declaration was upon an award made by an umpire appointed by a judge. The declaration alleged that the defendants were a banking company incorporated under the Companies Act, 1862; that a resolution was passed at a meeting of the company for a voluntary winding up; that there had been an appointment of liquidators, and a transfer of the business to another company; that the plaintiff was a shareholder, and expressed his dissent, pursuant to the provisions of section 161 of the said statute, and required the liquidators to abstain from carrying the resolution into effect, or to purchase the interest held by him in the company, at a price to be determined as in the said statute provided. The declaration set out several of the articles of association of the company, providing for the settlement of differences between the company and its shareholders by arbitration, one arbitrator to be appointed by each of the parties, and the two arbitrators to appoint an umpire, and in case no umpire was appointed within fourteen days after the appointment, an umpire might be appointed by the governor of the Bank of England, or by a judge under the Common Law Procedure Act, 1854; that if the arbitrators did not agree, the matter was to be referred to the umpire. It was also alleged that two arbitrators were appointed, that they did not appoint an umpire, that an application was made to a judge, who thereupon appointed an umpire, and that the umpire awarded that the fine to be paid for the purchase of the interest of the plaintiff was 2,100*l.*, which sum he directed the defendants to pay to the plaintiff, together with costs. Breach, that although all conditions were performed, &c., the defendants did not pay, &c.

The defendants pleaded, 9thly, on equitable grounds, that before the meeting, and before the cause of action accrued, the plaintiff was the holder of 120 shares, and was indebted to the company in 600*l.* in respect of calls, whereby an action had accrued to the company, and the shares had become liable to forfeiture. That it was agreed between the plaintiff and the defendants, that in consideration that the defendants would not press for payment of the money so owing, and would not declare

the shares forfeited, the plaintiff promised to consent to the proposal to reconstitute the bank, if duly authorised by a resolution of a general meeting; that he would vote for, and would not dissent therefrom, and would exchange his shares for shares in the new company. That the defendants did forbear, &c., that the defendants were duly authorised by a resolution of a general meeting, and the said resolution was passed as in the declaration alleged.

Cross demurrers and joinder in demurrer.

Holt, for the plaintiff, contended that the umpire had been properly appointed; that the articles of association and the Companies Act, 1862, pointed out the course which had been pursued, and that the action would lie against the defendants. He also contended that the plea was bad, inasmuch as it only disclosed matter which was the subject of a cross action.

H. Matthews (*H. James* with him), for the defendants, contended that the plea was good, that the declaration was bad, on the ground that the umpire had not been properly appointed. It must be taken that the appointment had been made under section 12 of the Common Law Procedure Act 1854, and that there was no averment that the requirements in that section had been performed. Further, the umpire's power was confined to ascertaining what was the price for the purchase of the interest of the plaintiff, and he had no power to direct that the price or the costs should be paid to the plaintiff. Further, that no action would lie at the suit of the plaintiff against the company at all.

Per Curiam (LUSH, J., HANNEN, J., and HAYES, J.). —The plaintiff is entitled to judgment. The appointment of the umpire is fully authorised by the articles of association. There was power to purchase the interest of the plaintiff, who was a dissentient shareholder, and the case may be looked upon as the case of a contract by the company to purchase that interest when ascertained. It has been ascertained, and an action is maintainable for the price. The company cannot withdraw from the contract. The plea is clearly bad.

Judgment for the plaintiff.

Common Pleas. April 29. } YOUNG *v.* AUSTEN.

Pleading—Bill of Exchange—Plea of Contemporaneous Agreement.

The declaration was by the payee against the acceptor of a bill of exchange; the plea in substance alleged that the bill was accepted, delivered, and received on the agreement and condition, that if at maturity a certain event had not happened the bill should be renewed; to this there was a demurrer, and the question resolved itself into whether or not it was necessary to allege that the agreement was in writing.

Finlay for the plaintiff.

M'Kellar for the defendant.

The COURT held that 'agreement' must be taken to mean a valid one, and therefore in writing.

Common Pleas. April 30. } MORRIS *v.* BETHELL.

Practice—Interrogatories—Evidence of Authority to Accept Bills.

Action by the indorsee against the acceptor of a bill of exchange. The defendant having obtained leave to defend on an affidavit denying that the acceptance was in his handwriting or signed by his authority, application was made by the plaintiff to MARTIN, B., at Chambers, for leave to administer interrogatories to the defendant. That learned judge allowed interrogatories as to whether the acceptance in question was the defendants, or made by his authority, but he refused interrogatories as to whether on a prior occasion a bill discounted by the plaintiff, and of which he was indorsee, was not accepted in the defendant's name by the same person and in a similar handwriting to that which was the subject of the action, and whether that prior acceptance had not been paid by the defendant's bankers with his sanction.

Holl now moved to vary the judge's order by having permission to administer the interrogatories which had been disallowed, and the motion was made on the ground that the answer to these interrogatories might be some evidence of an authority from the defendant to accept the bill sued on in his (the defendant's) name.

KEATING, J. and BRETT, J. refused the application, as no foundation had been laid for supposing that the defendant had held out that the person who had accepted the bill in his name was his agent for that purpose.

No rule.

Common Pleas. May 3. } MORTIMER *v.* BROADWATER.

Marine Insurance—Policy on Profits without Benefit of Salvage—19 Geo. II. c. 37.

This was an action against an underwriter on a valued policy on the profits upon a cargo of timber per ship Lizzie Jones from Quebec to Newry, 'warranted free from average, being against total loss only, and without benefit of salvage, and in the event of the non-arrival of the ship at her home port such non-arrival to be treated as a total loss.' The case came before the Court upon a special case, in which it was stated that the plaintiff, the insurer, had an interest in the profits insured, and the question was whether, notwithstanding this, the policy was within 19 Geo. II. c. 37, s. 1, and therefore void, by reason of its being without benefit of salvage to the assurer.

Byrth for plaintiff.

C. Russell for defendant.

The COURT held that the policy was within that Act, and that the case was concluded by, and undistinguishable from, that of *De Mattos* v. *North* (37 Law J. Rep. Exch. 116; s.c. Law J. Rep. 3 Exch. 185). The policy was therefore void.

Judgment for defendant.

Common Pleas. April 30. } JENNER *v.* SMITH.

Sale of Goods—Transfer and Vesting of Property.

The question in this case (which was an action for goods bargained and sold) was whether the property in certain hops had passed to the purchaser, so as to enable the seller to sue for the price of them. The defendant agreed verbally at a market to purchase of the plaintiff, amongst other hops, two pockets of Thorpe's, according to sample, and at the price of so much per cwt. The plaintiff informed the defendant the hops were at a warehouse in London, which he named; and it was further agreed that they were to remain there until the defendant wanted them, when they were to be delivered to the defendant free of expense, and as if they were at the market. The plaintiff had, in fact, three pockets of Thorpe's hops at that warehouse, and soon after the sale he directed the warehouseman to set aside two of such

pockets, and to put cards on them with the defendant's name, and to keep them until further orders. This was done accordingly, but no alteration was made in the warehouseman's book, and the defendant was not informed of what had been done until an invoice was sent, when he refused to take the hops or pay for them. Under these circumstances, Brett, J., having directed a verdict for the defendant, the question whether the property had passed came before the Court upon a *rule nisi* to enter a verdict, with power to the Court to draw inferences of fact.

Cole showed cause.

Morgan Lloyd supported the rule.

The Court (Keating, J., and Brett, J.) now held that they could not draw the inference from the above facts, that the defendant had made the plaintiff his agent for the complete selection of the two pockets, and doing what was required before the property would pass—namely, as to weighing the hops and ascertaining that they corresponded with the sample, and therefore, as no property passed by the contract,

The rule was discharged.

Common Pleas. May 4. } Taunton Election.

Election Petition—Finality of Decision.

H. James petitioned against the return of Serjeant Cox as member for Taunton, and claimed the seat. The petition came on for trial. H. James, when called as witness, was cross-examined to show that he had been guilty of bribery; the judge was addressed on the point, and the judge decided that Serjeant Cox was not duly elected, and H. James was. The judge certified on March 5; the alteration, by erasing Serjeant Cox's name, &c., was made on March 9, and a petition was filed against the return of H. James on March 29. The Court was asked to take the petition off the file or stay proceedings on the ground that the question had been decided finally and could not be reopened.

Manisty and *Cohen* for the petitioners.

Mellish, Giffard, and *Griffits* for H. James.

The Court decided that the matter had been finally adjudicated on, and stayed proceedings.

Common Pleas. May 3. } Collins *v.* The Middle Level Commissioners.

Negligence—Damage—Proximate Cause.

The defendants, under their Act for the drainage and navigation of the Middle Level of the fens, had constructed a cut, consisting of a broad embanked channel, which was above the level of the adjacent lands, and under this cut there was a small culvert, the property of the defendants, for the purpose of draining the lands on the east side of the cut into the lands on the west side, and which culvert the defendants were, by their Act, to keep open for the benefit of the owners of the lands on the east side. Owing to the defendants' negligence, the cut burst on the western side, and the waters of a tidal river flowed into the western lands, and ultimately ascended the culvert into the lands on the eastern side. The plaintiff, who was the owner of some of these lands on the eastern side, closed the culvert; but as this was thought by the owners of the lands on the west to be injurious to their lands, they caused the culvert to be opened again, and the result of this was to damage the plaintiff's land by the inundation. The question, which came before the Court upon a special case, was whether such damage was the natural consequence of the defendants' negligence, or whether, as the defendants contended, the proximate cause of the damage was not the wrongful act of the owners of the lands on the west in opening the culvert after the plaintiff had stopped it up.

Keane (*Merewether* with him) for the plaintiff.

Mellish (*O'Malley* and *Heathcote* with him) for the defendants.

The Court (Montague Smith, J. and Brett, J.) held that the proximate cause of the damage was the defendants' negligence, and that it mattered not that the consequences of such negligence had been stopped for a time by the works of the plaintiff, and that there had been afterwards a wrongful act by the owners of the lands on the west in preventing the plaintiff from escaping the natural result of the defendants' negligence.

Judgment for the plaintiff.

Common Pleas. May 4. } Flynn *v.* Robertson.

Arbitration—Mistake.

On a reference to one of the masters it was admitted on all hands that at all events a certain sum was due to the plaintiff. The master by mistake awarded that nothing was due; both parties agreed it was a mistake, and the master also told the Court it was so. The defendant, however, opposed the matter being sent back to the arbitrator.

Marriott for the plaintiff.

Willis for the defendant.

The Court held that there being clearly a mere mistake the matter should go back.

Exchequer. April 27. } Craven *v.* Smith.

Costs—Recovery of Sum not exceeding 10*l. in Action for Slander—*30 *&* 31 *Vict. c.* 142, *s.* 5*—Sheriff's Power to Certify.*

This was an action for slander, the words complained of imputing dishonesty. It was tried before the sheriff, and the plaintiff recovered 5*l.* The sheriff was of opinion that the plaintiff was entitled to his costs, but thought that he had no power to certify under 30 & 31 Vict. c. 142, s. 5, which enacts that, in an action of tort in a superior Court, in which the plaintiff recovers a sum not exceeding 10*l.*, he shall not be entitled to costs, 'unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court, or a judge at Chambers, shall, by rule or order, allow such costs.'

After an unsuccessful application at Chambers, the plaintiff obtained a *rule nisi* for his costs, against which

Francis showed cause. He took a preliminary objection that the nature of the action not having been disclosed on affidavit, the Court could not assume that the action was one of slander. This objection was overruled, the Court being of opinion that all records of the Court were constructively before the Court.

Anderson supported the rule, citing *Gray* v. *West,* 38 Law J. Rep. Q.B., 78, and urging that, as no action for slander could be brought in the County Court, the above-mentioned section did not apply to actions for slander.

The Court (Kelly, C.B., Bramwell, B., Pigott, B., and Cleasby, B.) held that section 5 applied to actions for slander, that the sheriff could have certified under it,

and that, considering the circumstances of the case, they concurred with him in his opinion that the plaintiff was entitled to his costs; but they declined to say that in every action of slander the plaintiff was entitled to his costs (so far as regarded the effect of the County Court Acts) as a matter of right, because the action could not have been brought in the County Court.

Rule absolute.

Exchequer. May 4. } WALKER *v.* CORY AND ANOTHER.

Practice—Cause Shown against Rule to Set Aside Nonsuit.

This was an action for demurrage by a shipowner against charterers under a charter party.

KELLY, C.B., before whom the case was tried at Guildhall, directed a nonsuit, but he took the verdict of the jury on one issue of fact, which verdict was in the plaintiff's favour, and he gave the plaintiff leave to move to set aside the nonsuit and enter a verdict for him. A rule *nisi* having been obtained for that purpose,

Joseph Brown (*Holl* with him) showed cause, and urged *inter alia* that the finding of the jury upon the issue left to them was against the weight of evidence.

F. M. White (*Prentice* with him), in support of the rule, contended that this question could not be discussed. The defendant should have moved, within the first four days of term, for a cross rule to set aside the finding of the jury as against the weight of evidence, in the event of the plaintiff's rule to set aside the nonsuit being made absolute.

It was stated that no authority existed upon this point of practice.

The COURT held that the defendants were entitled to raise the question on showing cause against the plaintiff's rule.

Court of Criminal Appeal.

Coram KELLY, C.B., KEATING, J., LUSH, J., BRETT, J., and CLEASBY, B.

Crown Case Reserved. May 1. } REGINA *v.* LUMLEY.

Bigamy—Presumption of Duration of Life.

Case reserved by LUSH, J.

The prisoner was convicted of bigamy in marrying with Captain Lumley on July 9, 1847, her former husband, one Victor, being alive. The prisoner married Victor in Jersey in 1836, and lived with him in England till the middle of the year 1843, when they separated, and nothing more was heard of Victor. HIS LORDSHIP withdrew the question of Victor's being alive at the time of the second marriage, and directed them, as a matter of law, that in the absence of any proof of his death at the time of the second marriage, he must be presumed to be alive.

Keane (*Collins* with him) for the prisoner.

Giffard (*Besley* and *Gough* with him) for the prosecution.

The COURT held that there was no presumption of law as to the duration of human life, and that the question as to Victor's life or death ought to have been left to the jury, and therefore quashed the conviction.

Conviction quashed.

Probate and Matrimonial Causes.

Probate. April 27. } *In the Goods of* G. CASMORE.

Will—Attestation Clause—Signature of Deceased.

G. Casmore, stationer, late of Yardley Street, Clerkenwell, deceased, made his will on April 16, 1864. He told the attesting witnesses, who happened to be in the house at the time, that he wished to make his will, in order to secure his property to his wife. He thereupon went and brought from his shop a printed form of a will, and filled up the blanks in their presence. After he had written his name in the testimonium clause, he requested the witnesses to sign theirs, which they did, and shortly afterwards, they being still present, he wrote his own name below their signatures. The deceased knew what was requisite to make a valid will, and the witnesses believed that he intended the signature in the attestation clause to be his signature to his will, and that the subsequent addition of his name to the instrument was for greater security.

Dr. Spinks moved for probate to the wife as executrix.

Lord PENZANCE considered the case as substantially the same as *In the Goods of John Walker* (2 Sw. & Tr. 354), and granted probate.

Divorce and Matrimonial Causes. April 24. } Ross *v.* Ross.

Petition for Judicial Separation—Deed to Live Separate—Connivance and Consent.

This was a petition by the wife for judicial separation, by reason of the husband's adultery. The respondent pleaded connivance.

Some years after the marriage differences arose between them in consequence of the respondent's intimacy with a woman of the name of Maria Smith, who had been a servant in the house. They ultimately agreed to separate, and with that view executed a deed on October 26, 1866. By it the respondent agreed that the petitioner might live separate and apart as a *feme sole*, and the petitioner on her part promised and agreed that the respondent should not be called upon to pay any of her debts so long as he made to her the stipulated allowance of 22*l.* per quarter. The deed simply recited that the reasons for the separation were 'unhappy differences' which had arisen between them, and it contained no reference as to the manner in which the respondent should live after the separation.

As a matter of fact, he was then living, and continued to live, with the woman Smith. The attorney who prepared the deed told Mrs. Ross in the course of the negotiations that her husband proposed to continue the intimacy. The petitioner did not forbid it, though she appeared shocked at it, and when the deed was executed witness understood that the respondent was to live with Maria Smith. He admitted, however, that the petitioner and respondent arranged the terms of the separation in a private room, and that nothing was said when the deed was signed. On the other hand, their daughter, who was present, deposed that her mother repeatedly declared she would never consent to the respondent living with Maria Smith, that she repeated this determination to him the morning the deed was signed, and that he assured her he had no intention of continuing the intimacy. The witness further deposed that until after the separation her mother had no certain knowledge of the respondent's cohabitation with Maria Smith, and that he frequently denied it when taxed with it by her.

Dr. Spinks (*Pritchard* with him) for the petitioner.

Dr. Deane (*Bayford* with him) for the respondent, contended that the execution of the deed of separation under the circumstances established connivance.

Lord Penzance held that it was the duty of the Court, in the interest of justice, to investigate the circumstances under which the deed was signed, and that, on that investigation, the evidence showed that the petitioner in no respect connived at her husband's adultery. If, indeed, as the condition of getting an allowance, she had consented to her husband continuing his intercourse with Maria Smith, that would have been connivance, even though the consent was extorted from her by reason of her destitution, unless the pressure amounted to that degree of force which would vitiate any agreement. She might be unwilling to consent to a continuance of the intimacy, but if she withdrew her unwillingness in order to get the allowance, then she would have been guilty of connivance. She had not done so, and was entitled to a decree.

High Court of Admiralty.

Admiralty Court. April 17, 27. } The Mali-Ivo.

Damage—Lis alibi pendens.

This was a cause of damage, in the sum of 700*l.*, on behalf of the owners of the Norwegian brig Helmich, against the Austrian ship Mali-Ivo, in respect of a collision which occurred between the two vessels in the Bosphorus on December 12, 1866.

Dr. Deane and *E. C. Clarkson* appeared for the Helmich, and

Butt and *Pritchard* for the Mali-Ivo.

On the morning of December 12, 1866, the Helmich, according to the case on her behalf, was off Karah Point in the Bosphorus, bound for Falmouth, and had put about to go on the port tack, when, the wind having dropped, she did not come round, and lay becalmed and out of command. The Mali-Ivo was then two miles distant, in tow of a steam-tug and approaching her. The tug passed clear, but the Mali-Ivo, without altering her course, with her starboard bow struck the Helmich's stern. The owners of the Helmich shortly afterwards instituted a suit in the Austrian Consular Court at Constantinople, and, after certain proceedings there, arrested the Mali-Ivo in the Admiralty Court for the same cause of action.

On behalf of the defendants it was contended that the proceedings at Constantinople were still pending, and that, therefore, this suit ought not to have been instituted here. Whenever there is *lis alibi pendens* this Court has a discretion whether it will also entertain the suit, and will exercise that discretion whether the proceedings are *in rem* or *in personam*. In this case the plaintiff could have had complete indemnity by the suit abroad, and in that suit many witnesses on both sides had been examined who were not accessible now, and therefore, the Court, in the exercise of its discretion, ought to dismiss the suit. Upon the facts it was clear that the Helmich improperly went before the bows of the Mali-Ivo, and so caused the collision.

Sir R. J. Phillimore.—It had been argued by counsel that the Court would not be anxious to entertain such a suit, but it had not been contended that the Court had not jurisdiction. It was well known that the jurisdiction of the High Court of Admiralty extended to all cases of collision happening within the ebb and flow of the tide. It is unnecessary in this case to consider whether or not the Court has a discretion to entertain such a suit when a suit in respect of the same subject-matter is pending elsewhere in which the parties could obtain full and substantial relief, for the facts showed that the proceedings before the Austrian Consular Court had been abandoned. Upon the merits His Lordship was of opinion that the Mali-Ivo was alone to blame, and decreed accordingly.

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Courts of Equity.

LORD ROMILLY, M.R. May 1. } THOMAS *v.* BUXTON.

Vendor and Purchaser—Payment of Purchase Money before Delivery of Possession.

The applicant in this case had purchased an estate which had been sold under a decree of the Court. By the conditions of sale the purchase money was to be paid on August 6, 1867, when the purchaser was to be let into possession. The purchase money was duly paid into Court on the day named, but, through the misconduct of the plaintiff, who was in possession of the estate and had the conduct of the sale, the purchaser could not obtain possession until July 22, 1868, when he was put into possession by the sheriff acting under a writ of assistance. The property had during the time the plaintiff had been improperly in possession, as aforesaid, sustained damage through neglect, and the purchaser had also paid certain arrears of tithes. He now sought by a summons to have repaid to him out of the purchase money the sum of 77*l.* 2*s.* 10*d.* for rent for the period during which the plaintiff had improperly kept him out of possession of the property, and for damage thereto, and for the costs of obtaining possession thereof, and for the arrears of tithes. The plaintiff had become bankrupt since the sale, and did not appear on the summons.

Mr. Cookson for the applicant.

Mr. Rowcliffe for the defendant, who was a trustee.

Lord Romilly, M.R., said that the applicant was entitled to what he asked by his summons, and that, if the parties could not agree as to the damages, he would direct an inquiry as to the amount. The costs of the applicant to come out of the purchase money, and those of the defendant to be costs in the cause.

Lord Romilly, M.R. } Neave *v.* Clarke.
May 4.

Mortgage—Penalty—Conditional Contract.

This was a creditors' suit instituted by the executors of a mortgagee, and the question was whether their mortgage debt was to be taken to be 5,000*l.* or 4,000*l.* The plaintiffs' testatrix advanced the sum of 5,000*l.* on a mortgage of real estate. The mortgage deed contained a proviso that the money should remain on the security during the life of the mortgagee; that the mortgagor should pay interest at the rate of 5*l.* per cent. per annum; and that if the interest was paid within twenty-one days of the same from time to time becoming due, and if the mortgagor should within six months after the death of the mortgagee pay to her representatives the sum of 4,000*l.*, the mortgagor should be entitled to a reconveyance of the mortgaged property and a release from all further claims in respect of the 5,000*l.*; but if the above conditions were not observed by the mortgagor, the mortgagee's representatives were not to be precluded from requiring payment of the 5,000*l.*, which was the sum in that event to be payable. The 4,000*l.* was not paid within six months after the death of the mortgagee, and her executors now sought to enforce payment of the 5,000*l.*

Mr. C. J. Shebbeare (*Mr. Jessel* with him) for the plaintiffs.

Mr. Osborne Morgan for the defendants.

Lord Romilly, M.R., said that the plaintiffs were entitled to the 5,000*l.* That was the amount originally advanced. The agreement was that if interest at the rate of 5*l.* per cent. per annum should be regularly paid within a certain time after its becoming due, and if 4,000*l.* should be paid within six months after the death of the mortgagee, the debt should be 4,000*l.* But if those conditions were not complied with, the mortgagee or her representatives were to be entitled to claim 5,000*l.* The conditions had been violated, and the property was, therefore, charged with 5,000*l.*

Malins, V.C. } *In re* South-Eastern of Portugal
May 8. } Railway Company (Limited).

Company—Winding-up—Companies Act, 1862, *ss.* 95, 96—*Power of Liquidator—Sanction of Court.*

This was a motion on behalf of certain creditors to vary an order made by His Honour on April 26, under section 96 of the Winding-up Act, whereby the official liquidator of the company was invested with authority to exercise, without the sanction of the Court, all the powers conferred by section 95; the contention being that a compromise, which the liquidator was purposing to effect in respect of a claim against the Portuguese Government (and which, it was alleged, would prejudice some of the creditors), was *ultra vires*, and ought not to be effected without the special sanction of the Court

Mr. Cotton, *Mr. Rowcliffe*, *Mr. Glasse*, and *Mr. Higgins*, for creditors, in support of the motion.

Mr. C. Hall, for the liquidator, insisted that the order was correct, and that the intended compromise was not only beneficial to all parties interested in the distribution of the assets, but was properly within the discretion of the liquidator, as contemplated by the 96th clause.

Mr. J. Pearson, *Mr. Fry*, *Mr. Wickens*, *Mr. Townsend*, and *Mr. Kekewich*, for other creditors, bondholders, &c., supported the order.

Malins, V.C., referring to the circumstances under which the order had been made, had no doubt as to its expediency, and held that the intended compromise was within the scope of the powers authorised by section 96, as explained by reference to the 95th. The liquidators under the order as it stood had power 'to execute and do all such things as might be necessary for the winding-up. His Honour did not consider that these general terms were limited by section 160. Being of opinion that the liquidator was acting within the powers conferred upon him by the order, and that the order was properly made, he should dismiss the present motion with costs.

James, V.C. } Daun *v.* The City of London
April 22, May 6. } Brewery Company (Limited).

Mortgage—Alternating Priorities—Mortgage of Public House to Brewers—Second Mortgage to Distillers—Custom of Trade.

George Smith, the lessee of the Green Dragon public-house, Fore Street, Cripplegate, in the city of London, on March 26, 1858, deposited his lease of the public-house and other premises, by way of mortgage, with a firm of brewers, who were succeeded by the above-named company, to secure to them and their successors a debt of 202*l.*, and any further sum in which he might become indebted to them up to 500*l.*, there being a custom of the trade between brewers and publicans that the publican should give to his brewers such a deposit as a security for the payments for beer supplied and advances made to him by the brewers. On July 11, 1865, George Smith made a second equitable mortgage of the same premises by a memorandum as a security for a debt of 120*l.* then due to the plaintiffs, a firm of distillers, and all other sums in which he might thereafter become indebted to the plaintiffs or their successors for goods supplied or moneys advanced to him by the plaintiffs. On the same July 11 the plaintiffs gave the Brewery Company notice of their equitable mortgage. In November 1867 George Smith, with the consent of the Brewery Company and the plaintiffs, contracted to sell the public-house and other mortgaged premises to one Jackson. The Brewery Company, notwithstanding the notice given to them by the plaintiffs, claimed to have a first charge on the premises and the purchase money for the sum of 300*l.*, a large part of which they alleged to be due to them for goods supplied to George Smith after their notice of the plaintiffs' mortgage, setting up a custom of the trade that the security given by the publican to the brewer was always a first charge on the mortgaged premises, and was unaffected as to further advances by the second charge usually given to the distillers. The plaintiffs filed this bill for the purpose of postponing to their own claims those of the Brewery Company, in respect of such part of their debt as was incurred subsequent to the plaintiffs' notice.

Mr. Amphlett and *Mr. A. G. Marten* were for the plaintiffs.

Mr. Kay and *Mr. D. Sturges* for the defendants, the Brewery Company.

Mr. E. James and *Mr. W. Pearson* for other defendants.

James, V.C., said that, even if such a custom of trade as the defendants set up had been proved, he should be slow to give effect to it so as to alter interests in land which, by rule of law, could only be affected by some writing. But the custom had not been at all made out to his satisfaction, and the plaintiffs were entitled to a decree adjusting their priorities with the defendants' in the order their respective supplies were delivered to Smith.

Malins, V.C. } Overend, Gurney & Co.
April 21, 22, 28. } *v.* Gurney.

Demurrer—Bill by Company against Directors—Alleged Breach of Trust.

This was a bill by the above company against the surviving directors of the company and the representatives of Mr. Gibbs, a deceased director, seeking to make them liable for misfeasance and breach of trust in having purchased the business of the old firm of Overend & Gurney, with knowledge of its actual insolvency at the time of purchase; and further charging them with neglect in omitting to enforce the guarantee of the old firm by taking sufficient security to make good any deficiency in the assets and cover all liabilities.

A general demurrer was put in on behalf of Mr. Gibbs' representatives, on the ground that it was not competent for the company to sue its own directors; that the alleged misfeasance being in the nature of a common tort, their remedy was by action at law; and that the proceedings, if rightly taken in this Court, should have been not by bill but upon summons under the Companies Act (see *Mercantile Trading Company, Stringer's Case, anté*, p. 102).

A further point was taken, but was not pressed in argument, that the right to relief was gone by effluxion of time since Mr. Gibbs' death.

Mr. Glasse, Mr. H. M. Jackson, and *Mr. McLean* for the demurrer.

Mr. Cotton and *Mr. Ferrers* for the bill.

Malins, V.C., held that the company had a right to sue, and overruled the demurrer upon the authority of Lord Hardwicke's decision in *The Charitable Corporation* v. *Sutton*, 2 Atkyns, 400, followed by Lord Langdale in *The Society of Practical Knowledge* v. *Abbott*, 2 Beav. 559. Although an application under the summary jurisdiction provided by the Companies Act might have been sustained, a matter involving claims of such magnitude was more properly brought on by bill and answer than by a summary process.

Courts of Common Law.

Queen's Bench. } Story *v.* Ashton.
May 7. }

Negligent Driving—Master and Servant—Driver going on a Journey without his Master's Leave.

This was an action to recover compensation for injuries sustained by the negligence of the defendant's servants.

It appeared on the trial that the defendant's van had been taken out on the morning of the day of the accident by some servants of the defendant, for the purpose of delivering hampers and bottles at Blackheath and the neighbourhood. The premises of the defendant were at Vine Street, near the Minories; and on crossing London Bridge after completing their rounds in the afternoon, the servants of the defendant, instead of returning to Vine Street with the empty return bottles and hampers, drove up the City Road to bring back a cask for a friend of their own, and not at all in the defendant's business. The plaintiff was run over in the City Road, when the van was more than two miles out of its way, by the negligence of the driver. The jury assessed the damages at 80*l.*, and Hannen, J. directed the verdict to be entered for the defendant, leave being reserved to the plaintiff to move to enter it for him, if the Court should be of opinion that the defendant was, under the circumstances, liable for the accident. A rule having been obtained accordingly,

Prentice and *A. L. Smith* showed cause, and

Digby Seymour and *Finlay* supported it.

The Court (Cockburn, C.J., Mellor, J., Lush, J., and Hannen, J.) discharged the rule. If the driver in the course of his business had made a slight deviation for some object of his own, the question as to whether the master would be liable for any negligence during this deviation would be one of degree. But in the present case the driver had started upon an entirely independent journey, for a purpose which had nothing to do with his master's business, and the defendant could not be made liable.

Rule discharged.

Queen's Bench. } Dignam *v.* Baily.
May 7. }

Sheriff—Escape—Deed under Section 192 *of the Bankruptcy Act*, 1861.

Declaration against the defendant, as sheriff of Kent, for allowing one Brassington to escape. The declaration stated that the plaintiff obtained judgment against Brassington on December 11, 1866, and sued out the *ca. sa.* directed to the defendant upon the 14th of the same month. Pleas—first, not guilty; secondly, that after the defendant had taken Brassington into custody in execution of the writ, he produced a certificate of the registration of a deed within the meaning of section 198 of the Bankruptcy Act 1861, and the defendant thereupon discharged him from custody. Replication—first, joining issue on the pleas; secondly, to the second plea, that the

plaintiff's cause of action against Brassington in respect of which the judgment was recovered, first arose and accrued to the plaintiff after the making and after the registration of the deed, and that the plaintiff was not a creditor of Brassington in respect of these causes of action when the deed was made, nor until after the certificate was granted, and the plaintiff was not amongst the creditors referred to or intended to be bound by the deed. Rejoinder taking issue on this replication. There was also a demurrer to the second replication, but upon argument the Court held this replication good: see *Dignam* v. *Baily*, 37 Law J. Rep. Q. B. 71.

At the trial of the issues of fact it appeared that the action against Brassington was upon a bill of exchange accepted by him, and outstanding at the date of the deed, which was June 26, 1866. The bill became due on July 28, the writ was issued November 27, judgment obtained on December 11, and the defendant arrested and discharged on December 15. The jury found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict in his favour. A rule having been obtained,

Digby Seymour showed cause, and

Raymond supported it.

The Court (Cockburn, C.J., Mellor, J., Lush, J., and Hannen, J.) made the rule absolute. No question was raised on the pleadings as to whether the debtor had or had not any opportunity to plead the deed; and as it appeared, on the authority of *Woods* v. *De Mallos*, 35 Law J. Rep. Exch. 64, that the claim on the bill was provable under the deed, the sheriff was justified in discharging the debtor, although the date of the judgment was subsequent to that of the certificate of registration.

Rule absolute.

Queen's Bench. May 7. } Marks *v.* Feldman.

Money Had and Received—Rights of Assignees in Bankruptcy—Bankruptcy upon Bankrupt's own Petition—Goods Delivered to Creditor by Way of Fraudulent Preference, and Sold before Bankruptcy.

In this case it appeared that one Jackson, in July 1867, was indebted to several persons, and amongst others to the defendant, in a sum of 200*l.* or 300*l.* On the 26th he gave to the defendant a bill of sale, which comprised substantially the whole of his property. The defendant immediately afterwards took possession of and sold the goods. In October Jackson became bankrupt on his own petition, and in November the plaintiff was appointed creditors' assignee. A demand was made on the defendant for the goods, and an action commenced, the declaration containing counts in trover and money had and received. The question was whether the plaintiff could recover under these counts, it being admitted that the bill of sale was a fraudulent preference. A rule to enter the verdict for the defendant having been obtained,

Overend and *Forbes* showed cause; and

Field (*Bullen* with him) supported the rule.

The Court (Cockburn, C.J., Mellor, J., Lush, J., and Hannen, J.) made the rule absolute. It was admitted that the plaintiff could not recover on the count in trover, because the defendant had sold the goods before the act of bankruptcy, so that the assignees had no opportunity of disaffirming the transaction, as their rights did not relate back to the conversion. The same reasoning appeared to the Court to apply to the count for money had and received. The case was, in fact, decided by *Young* v. *Billiter*, 30 Law J. Rep. Q. B. 153.

Rule absolute.

Common Pleas. May 4. } Brydges *v.* Garrett.

Copyholds—Deputy Steward—Authority to Receive Fines on Admittance.

Action for fines claimed by the plaintiff as lord of a copyhold manor. The defendant had bought some copyhold land, of which the plaintiff was lord and a Mr. Mills his steward. Mr. Mills sent a draft admission to a Mr. Craig, who was acting as the defendant's solicitor, on the purchase, and in the margin of the admission there was a statement of the sum the defendant had then 'paid to the lord for a fine.' This draft admission was returned to Mr. Mills approved of, and shortly afterwards Mr. Mills wrote to Mr. Craig, making him deputy steward, to take the admission of the defendant, and fixing the amount of the fines and fees. Mr. Craig accordingly took the defendant's admittance as such deputy steward, and shortly afterwards received a cheque from the defendant for the amount of the fines and fees. The cheque was a crossed cheque, and was paid by Craig into his own banker's. The cheque was duly honoured by the defendant's bankers, on whom it had been drawn, but Craig became insolvent, and the money was never received by either the plaintiff or Mr. Mills. On the trial before Byles, J., at Chelmsford, at the Spring Assizes of 1868, the question was whether on the above facts there was evidence to support a plea of payment. The jury found a verdict for the defendant, and a rule *nisi* having been obtained to enter a verdict for the plaintiff for 78*l.* 15*s.*, the amount claimed,

Denman and *Cohen* showed cause.

Garth and *Digby* supported the rule.

Cur. adv. vult.

Bovill, C.J., and Montague Smith, J., now (May 4) held (Byles, J., *dissentiente*) that Craig, though duly appointed deputy steward to take the admittance, had no authority to receive the fine for the lord in the way in which he received it, and that the rule therefore to enter the verdict for the plaintiff should be made absolute.

Rule absolute.

Common Pleas. May 5. } The New Sarum Petition. Ryder (Appellant) *v.* Hamilton (Respondent).

Parliament—Register of Voters Final—6 Vict. c. 18, s. 98.

This was an election petition which had been turned into a special case by the order of Willes, J., raising the question as to the right of certain voters to be on the register who had voted for the respondent at the election last November, for the borough of New Sarum. The objection to the voters was that, though their occupation was sufficient to entitle them to be on the register, they had not been rated to or paid a rate made on Aug. 26, 1867, the same having been compounded for and paid by their landlords. The question now was whether, as no objection had been made to these voters before the revising barrister, and consequently their names had been retained on the register without the express decision of such bar-

rister, the register was, by virtue of section 98 of 6 Vict. c. 18, final and conclusive.

Quain (*Staveley Hill* and *Archibald* with him) for the appellant.

Mellish (*Clive* with him) for the respondent.

The COURT held that section 98 of 6 Vict. c. 18 was incorporated with the Representation of the People Act, 1867, and that the register was final and conclusive, as the objection to the voters was one to the qualification on which the revising barrister might have decided, and did not come within any of the exceptions to the register being conclusive which are mentioned in section 98.

Petition dismissed.

Common Pleas. May 5, 6. THE MANCHESTER PETITION. ROYSE AND ANOTHER (APPELLANTS) *v.* BIRLEY (RESPONDENT).

Parliament—Incapacity of Member by Reason of Holding a Government Contract—22 Geo. III. c. 45—Contract with Secretary of State for India—Executed Contract—Notice of Dealing with the Government.

This was a special case stated for the opinion of the Court, as to whether the respondent, who had been returned as member of Parliament for the city of Manchester, was incapable of being elected by reason of his holding or enjoying, at the time of the election, any contract made with anyone on account of the public service, contrary to 22 Geo. III., c. 45, s. 1. The facts were that the respondent was a member of the firm of Charles Macintosh & Co., who had entered into a contract with the Secretary of State for India in Council for goods for the troops in India. The goods had been sent and accepted, and with the exception of the payment, which was not due until January last, the contract had been completely executed before the election. The firm of Macintosh & Co. had also supplied the Broadmoor Asylum with three dozen india-rubber utensils, for the price of 7*l.* 11*s.*, under a contract which was existing at the time of the election. The Broadmoor Asylum had been declared a Criminal Lunatic Asylum by an order in Council made under the sign manual, pursuant to 23 & 24 Vict. c. 75, s. 1, but it was admitted that neither the firm nor the respondent were aware at the time that the asylum was a Government asylum. The question was whether either of these were such contracts as fell within the meaning of 22 Geo. III. c. 45, s. 1.

Manisty (*Brice* with him) argued for the appellants.

Mellish (*O'Malley* and *Birley* with him) for the respondent. *Cur. adv. vult.*

May 6.—The COURT now gave judgment for the respondent. They did not decide whether a contract with the Secretary of State for India in Council was a contract within the meaning of the statute, but they held that as the contract in question had been executed before the election so far as the respondent was concerned, and nothing remained to be performed under it but the payment, it was not a contract within the statute. The COURT also held that knowledge that the contract was a contract with the Government was essential to bring the case within the statute; and as there was no such knowledge on the part of the respondent in the case of the contract with the Broadmoor Asylum, that also was not within the statute, and the respondent therefore was entitled to keep his seat.

Petition dismissed.

Common Pleas. May 7. HEILBERT AND OTHERS *v.* NEVILL.

Bankruptcy—Fraudulent Preference—Joint Action by Assignees with Solvent Partner of Bankrupt.

This was an action of trover, with a count for money had and received, brought by the assignees in bankruptcy of Still, a bankrupt jointly with one Briggs, who had been in partnership with the bankrupt; and the action was brought to recover the value of certain bills of exchange belonging to the partnership, which, in December, 1866, had been wrongfully indorsed by Still in the name of the firm for a private debt of Still's to the defendant, who had so taken the bills from Still with knowledge of the whole transaction, and in fraud of the partnership. On March 13, 1867, Still was arrested, and he was adjudicated bankrupt on April 18 by the registrar, pursuant to the Bankruptcy Act of 1861. The question was whether the plaintiffs or any of them were entitled to maintain the action, and it came before the Court on a rule *nisi* to set aside a nonsuit, and to enter a verdict for the plaintiffs for the amount claimed.

Keane and *Barnard* showed cause against the rule.

Butt argued in support of it.

The COURT held that the assignees had a right to treat the indorsement and handing over of the bills by the bankrupt to the defendant as void, or that they then became entitled as tenants in common with Briggs to the property in the bills, and therefore able to maintain this action jointly with him.

Rule absolute.

Common Pleas. May 7. CALLAGHAN *v.* DOLLIVEN.

Friendly Society—Reference of Disputes—Appeal.

This was a case stated by magistrates under 20 & 21 Vict. c. 43. By the rules the disputes were referred to the magistrates.

Lister for the appellant.

Warton for the respondent.

The COURT, having taken time to consider, now overruled the decision of SHEE, J., in *Watts* v. *Justices of Kent*, 35 Law J. Rep. M.C. 190, and held that as 21 & 22 Vict. c. 101 repealed the proviso of 18 & 19 Vict. c. 63, s. 40, the residue of the section prevented any appeal.

Appeal dismissed.

Common Pleas. May 8. MAKIN *v.* THE LONDON RICE MILL COMPANY.

Contract, Construction of—Breach—Damages.

This was an action for breach of contract in the delivery of certain rice. The contract was for 800 bags of rice 'in double bags' as per sample, at so much a hundredweight; the rice was sent in thick, but not in double bags. It was admitted there was a breach of contract, and money paid into Court. It was, however, contended that the damages should be only what it would cost to put the rice into double bags, or the difference in value between rice in and not in double bags, and not the difference between its price and what it was sold for by the plaintiff, confessedly acting properly; and the defendant proposed to ask whether the actual bags were not as effectual as double bags, which question was disallowed. The jury gave a verdict for the loss on the sale.

Milward had moved to reduce the damages, or for a new trial, on the ground of the rejection of evidence.

The Court now decided that the provision as to the bags was so material as to justify a rejection of the rice, and the amount of damages was therefore correct; and, further, that the question proposed was immaterial, and refused a rule.

Rule refused.

Common Pleas. May 8. } Button *v.* Thompson.

Seaman's Wages, whether Monthly or not—Misconduct.

In this case the plaintiff sued for his wages as a seaman. It appeared that he had shipped under articles which provided that his wages should be so much a month for a certain voyage, that he had behaved badly on the voyage to X., that there he delayed on shore and was left behind, and that he did not finish the voyage. The question was whether or not he was entitled to his monthly wages which had accrued before he was left behind.

Quain and *Crompton* for the plaintiff.

Manisty and *Maclachlan* for the defendant.

The Court took time to consider.

The majority of the Court now held that the wages accrued at the end of each month, and that, as the finding of the jury was consistent with the plaintiff's having accidentally remained behind, and his previous conduct was not shown to have been dangerous to the ship, and he had not been discharged, there was no forfeiture, and that the plaintiff was entitled to his wages.

Judgment for plaintiff.

Common Pleas. May 8. } *Re* Poole.

Readmission of Attorney.

An attorney had been struck off the rolls in 1863 for fraudulent misappropriation of his client's money. He now applied to be readmitted, on affidavits of his good conduct since.

Meadows White for the applicant.

Garth and *Murray* for the Law Society.

The Court held that in such case it was a condition precedent to the consideration of the application that it should be shown that reparation had been made, or that there had been sincere and earnest endeavours to make reparation; and in the absence of this would not entertain the application.

Rule discharged.

Common Pleas. May 8. } Twibell *v.* The London Suburban Banking Company.

Banker—Partner—Joint Account—Neglect of Instructions—Party to Action—Damages.

In this case the plaintiff and his partner, D., deposited money jointly with the defendants, cheques to be drawn by either, but initialed by the other. The defendants cashed a cheque of D. for 278*l.* not initialed by the plaintiff, and D. appropriated the money. The plaintiff brought this action to recoup his loss, and a verdict was found for half the amount of the cheque.

H. James moved to enter a nonsuit, on the ground that D. should have been joined, or to reduce the damages to nominal damages, on the ground that there was nothing to show what were the proportionate interests of the partners.

The Court held (1) that the stipulation was for the benefit of and with each partner separately, and that the plaintiff rightly sued alone; (2) that the custom had always been to consider, apart from proof to the contrary, that partners were equally entitled, but that whether that were so or not, yet as the judge reported that this was assumed at the trial, the damages were correct.

Rule refused.

Exchequer. April 30. } Isitt *v.* Beeston.

Bankruptcy, Act of—B. L. C. Act, 1849, *s.* 67—'*Fraudulent Delivery or Transfer.*'

Trover by the assignee of one Lockett, a bankrupt, for furniture and stock-in-trade removed from the bankrupt's premises.

At the trial, before Martin, B., it appeared that Lockett having placed the goods in question in a van at the door of his house, they were removed, early in the morning of August 12, 1868, to a warehouse kept by the defendant, and that later in the same day Lockett himself left the house with his family. The defendant afterwards advanced money on the goods, but it did not appear that he knew anything at the time about Lockett's affairs. Lockett was adjudicated a bankrupt on August 20.

Martin, B., ruled that the removal of the goods was not 'a fraudulent delivery or transfer' constituting an act of bankruptcy within the meaning of section 67 of the Bankruptcy Law Consolidation Act, 1849, and nonsuited the plaintiff accordingly.

A rule having been obtained to enter a verdict for the plaintiff for the value of the goods,

Francis showed cause.

C. E. Pollock and *Day* supported the rule.

The Court (Kelly, C.B., Martin, B., and Cleasby, B.) held that the nonsuit was right, and, following *Cotton* v. *James* (M. & M. 273), discharged the rule.

Rule discharged.

Exchequer. May 6. } Freeman *v.* Jeffries.

Money Had and Received—Mistake of Fact known only to Plaintiff—Notice to Defendant necessary to entitle Plaintiff to Maintain his Action—Effect of Laches on Plaintiff's Part—Valuation of Crops, &c., between Outgoing and Incoming Tenant—Construction of Agreement to refer to Valuers—Matters included in Valuation Contrary to Custom of Country.

Action for money received to plaintiff's use. By agreement between plaintiff and defendant the defendant conveyed and assigned to the plaintiff, in consideration of 2,000*l.*, all his interest in a certain farm, together with all the growing crops and those already harvested, all the covenants and general valuation of the farm, all the live stock and also all the dead stock as generally used upon the said farm. And it was agreed that all the aforesaid matters and things should become a subject of valuation by two indifferent persons, one to be chosen by each party; and in the event of their differing, then by their referee or umpire, whose decision should be final and binding on the parties; and that, after the valuation was made and award prepared, the remainder of the money should be

made payable to the defendant on November 1 then next by note of hand. 2000*l.* was paid down on account of the purchase. The valuers appointed went over the farm, and made an inventory of the articles. They valued and adjudged the value in a gross sum of 5,319*l.* The inventory did not specify the amount of each particular item. It was handed to the defendant, by whom it was delivered to the plaintiff, who, without examining it, and assuming all to be correct, gave to the defendant a promissory note for the balance, consisting of 3,319*l.* The plaintiff in a month or two after resold his interest in the farm, and upon the valuation then made it was alleged that it had been discovered that the former valuers had included matters which, according to the custom of the country, did not form the subject of valuation between an incoming and outgoing tenant. The plaintiff, however, made no complaint of this to defendant, and paid the note when due without objection.

The plaintiff afterwards, in December, brought the present action without any notice or demand of repayment to the defendant. He sought by his particulars to recover the whole sum paid under the agreement.

Upon these facts being proved at the trial a verdict was entered for the plaintiff, subject to a reference as to the exact amount, and leave was reserved to the defendant to move to enter a nonsuit. A rule had been accordingly obtained, against which

J. Brown, *Honyman*, and *Finlay* now showed cause.

They contended that the valuation was void, inasmuch as it included in a gross sum matters which were not within the jurisdiction of the valuers to assess, and which were not severable; and that therefore the plaintiff was entitled to recover back the purchase money which he had paid. They further contended that if this were not so, he was entitled to recover back the value of those items which were incorrectly included in the valuation.

Hawkins and *Philbrick*, in support of the rule, contended that the valuers were put in the position of arbitrators, whose decision was to be final between the parties, and that if it were otherwise the plaintiff could not recover in the absence of any notice to the defendant of the facts, which entitled plaintiff to a return of the money.

The COURT held that the action was not maintainable.

Per KELLY, C.B., MARTIN, B, and PIGOTT, B.—Upon the true construction of the agreement the valuers had jurisdiction to determine what, according to the custom of the country, was a subject of the valuation, and their decision was final.

Per KELLY, C.B.—The conduct of the plaintiff in not giving notice at the earliest opportunity to the defendant of the circumstances, and lying by until it was impossible the mistake, if any, could be rectified, had rendered it inequitable that he should be entitled to a return of any part of the money, and that therefore the action would not lie.

Per MARTIN, B., and BRAMWELL, B.—The mistake of fact, if any, under which the money was paid being known only to the plaintiff, the money did not become money received to his use until he had given notice of it to the defendant by claiming back the money.

Rule discharged.

Probate and Matrimonial Causes.

Divorce and Matrimonial Causes. March 4, 16, May 5. } MORGAN *v.* MORGAN AND PORTER.

Husband's Petition for Dissolution of Marriage—Adultery of Petitioner—Adultery long antecedent to Wife's Misconduct: Discretion of Court under 20 & 21 *Vict. c.* 85, *s.* 31—*Costs.*

This was a petition by the husband for dissolution of marriage on the ground of adultery. The respondent and co-respondent traversed the charge, and the respondent further pleaded counter-charges of adultery, and wilful neglect and misconduct conducing to adultery. The cause was tried before the JUDGE-ORDINARY, by a common jury, on March 4, and the jury found—(1) that the respondent had committed adultery with the co-respondent; (2) that the petitioner had not condoned such adultery; (3) that he had not been guilty of wilful neglect or misconduct conducing to adultery; but (4) that he had committed adultery with a woman of the name of Bentley.

The marriage took place in 1855. The adultery with Bentley was committed a year or two afterwards, and it did not appear that it was known to the wife until after the filing of the petition. The respondent also alleged adultery with a woman of the name of Rhodes, but no evidence was adduced in support of this charge, which the petitioner had come prepared to meet.

Dr. Deane (with him *Inderwick*), for the petitioner, moved the Court (March 16) to exercise the discretionary power vested in it by section 31 of the 20 & 21 Vict. c. 85, and to grant a decree *nisi*, notwithstanding the adultery of the petitioner.

Dr. Spinks (with him *Searle*), for the respondent, opposed the application.

Pritchard for the co-respondent.

Cur. adv. vult.

May 5.—Lord PENZANCE now delivered the following judgment:—'The general question involved in this case is a serious one. It is practically this: To what extent ought this Court to exercise a discretion in granting or withholding a divorce to a petitioner who has himself been found guilty of adultery? There is no doubt, I think, that the Legislature has invested the Court with a discretion on this subject. And there is equally no doubt that there are cases in which the adultery of a petitioner has been committed under such circumstances that it ought not in justice to stand in the way of a decree. In one case, the respondent, who was living in

adultery, had contrived to induce the petitioner to believe that she was dead. Upon receiving this information the petitioner married again. When he found out his mistake, he sued the respondent for her adultery, and she retorted the adultery of which he had been guilty with his second wife. The Court thought that ignorance was innocence, and granted him his decree. In another case the wife was the complainant. She proved a case for divorce against her husband, and he in turn accused her of adultery, which was established. But it was further proved that he had, by threats and violence, forced her to lead an immoral life, from which he derived a pecuniary benefit. It was held that adultery so caused ought to be no bar to the wife's relief. It may also well be that an act of adultery committed by a petitioner to the knowledge of the respondent, and by him or her long since pardoned and condoned, ought not to preclude the petitioner from all remedy for the subsequent adultery of the respondent. This was much discussed in the Ecclesiastical Court in the case of *Anichini* v. *Anichini*, and it was pointed out that, upon a contrary view, a sort of license to commit adultery without punishment would be set up on the one side by guilt on the other, however distant in point of time, or however completely forgiven and condoned. There appears to me to be great force in the observations of the learned judge in that case, and on a proper occasion it will be very fit to consider whether his views ought not to be adopted in applying the discretion vested in this Court by section 31. Here, then, are three classes of cases, and there may be, and probably are, others in which this discretion may be fitly exercised in favour of a petitioner. But in cases where the adultery complained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse. A loose and unfettered discretion of this sort upon matters of such grave import is a dangerous weapon to entrust to any Court—still more so to a single judge. Its exercise is likely to be the refuge of vagueness in decision and the harbour of half-formed thought. Under cover of discretion, a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favourable or otherwise to the person whose conduct is under review, which the course of the evidence has evoked. Upon such materials, so used, two minds will hardly ever form a judgment alike, and the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This invites public criticism and shakes public confidence in the justice of the tribunal. I hold, therefore, that the discretion to be exercised under section 31 of the statute should be a regulated discretion, and not a free option subordinated to no rules. It was probably reposed in the Court because the Legislature found it impossible to foresee and specify the classes of cases fit for its application which might arise under the new law. The duty of reducing its exercise to method devolves upon the Court. Past experience has already pointed out some classes of cases to which it is fitly applied, and the future may probably furnish more. But the facts of this case present no definite features beyond mere lapse of time to justify its exercise, and the Court must refuse a decree.' On the question of costs, it was ordered that such costs as were incurred by the petitioner in respect of the charge of adultery with the woman Rhodes should be deducted from the sum paid into Court to meet the respondent's costs of trial.

Decree refused.

Probate.
May 5. } BARNES *v.* DURHAM.

Revocation of Grant of Administration with Will annexed —Letters of Administration in hands of Proctor with Lien on them for Costs—Order as to Delivery for Cancellation—Practice.

John Durham, late of Witham, in the county of Essex, grocer, died on August 28, 1856, leaving a duly executed will in which he appointed his wife, Elizabeth Durham, sole executrix and residuary legatee.

Elizabeth Durham died without having proved the will, and letters of administration of her personal estate and effects were granted to John Dykes Durham, the defendant, her natural and lawful son and next of kin, on the suggestion that she had died intestate. Subsequently letters of administration, with the will annexed of John Durham (the father), were granted to him as administrator of Elizabeth Durham.

The suggestion that Elizabeth Durham had died intestate was untrue. She left a duly executed will, of which she appointed John Barnes, the plaintiff, executor. The defendant, at the time he obtained administration, was aware of the fact.

In January 1868, probate of the will of Elizabeth Durham was granted to the plaintiff as executor, the administration previously granted to the defendant having first been revoked, and in the following February a citation was issued at the instance of the plaintiff, and served by advertisement on the defendant, to bring in the letters of administration with the will annexed of John Durham, deceased, and to show cause why they should not be revoked. A copy of this citation was served upon Messrs. Moore & Currey, the defendant's proctors, who obtained them. They admitted that the letters of administration were in their possession, but refused to give them up, on the ground that they had a lien upon them for their costs of obtaining them.

Dr. Tristram, for the plaintiff, now moved the Court to revoke the grant made to the defendant, and to make such order as to the Court should seem fit respecting bringing into the registry the letters of administration in the hands of Messrs. Moore & Currey, with a view to their being cancelled. He also asked that the defendant might be condemned in the plaintiff's costs, as he was aware of the existence of the will when he obtained the grant.

LORD PENZANCE.—As Messrs. Moore & Currey claim a lien on the letters of administration, I do not see my way to making an order on them to deliver them up; and the Court must therefore proceed in the matter as best it can under the circumstances. I will make this order, that the grant of administration with the will of John Durham annexed be revoked; that the plaintiff bring the letters of administration into the registry should they ever hereafter come into his possession, and that a copy of this order be served on Messrs. Moore & Currey. I also condemn the defendant in the plaintiff's costs.

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May 8. } (Limited).

Practice—Winding-up—Appointment of Special Examiner—15 & 16 Vict. c. 86, *ss.* 31 *and* 40.

Pending the proceedings in the winding-up of the above company, a special examiner had, on an *ex parte* application, been appointed to take the examination of all persons whom it might be necessary to examine *viva voce* in the winding-up. A contributory of the name of Hakin had been subpœnaed to attend before the special examiner so appointed, and had refused to do so on the ground that he had not consented to the appointment of a special examiner.

Sir Richard Baggallay and *Mr. Higgins*, on behalf of the liquidator, now moved to have Hakin committed for contempt of Court, alleging that in every branch of the Court it had been the practice in winding-up matters to appoint special examiners to act throughout the proceedings.

Mr. Jessel and *Mr. Marten*, for Hakin, referred to 15 & 16 Vict. c. 86, ss. 31 and 40, and asked that the application should be refused with costs.

The Master of the Rolls said that the practice of appointing a special examiner to act throughout the proceedings in a winding-up was a very improper one. He was not aware that such a practice had prevailed. A special examiner was only appointed when the ordinary examiners had not time to take the examination. When that was so, and when all the parties agreed upon a special examiner, he was appointed. If the parties did not agree, then the Court appointed one; but every party had a right to be heard as to the appointment. So far as his experience had gone, the parties had always agreed. The application must be refused, but without costs.

Stuart, V.C. May 8. } *Re* Lyne's Estate—Sands *v.* Lyne.

Will—Pecuniary Legatees—Insufficient Estate—Abatement—Residuary Legatees—'Fall into Residue.'

Edward Lyne by his will bequeathed 1,000*l.* to trustees upon trust, to invest the same and to pay the income thereof to his grandchild, Sarah Sands, during her life, and after her death to divide the principal amongst her children as she should appoint, and directed that in default of her children the said sum of 1,000*l.* and all securities for the same should fall into his residuary estate. He then bequeathed certain pecuniary legacies, and bequeathed the residue of his estate to his trustees upon trusts, after payment of debts, for the benefit of Sarah Sands and the children of J. G. Lyne.

By a codicil the testator bequeathed another legacy, and directed that in case his personal estate should be insufficient to pay the legacies bequeathed by his will and codicil in full, all the said legacies should proportionately abate.

The personal estate was insufficient, and an apportionment was made in respect of the various legacies, a sum of 598*l.* being set apart to answer the legacy of 1,000*l.* Sarah Sands died without ever having been married, and the question now argued was whether the residuary legatees were entitled to the sum of 598*l.*, or whether that sum should be applied in further payment of the pecuniary legacies.

Mr. Dickinson and *Mr. Montagu Cookson*, for the residuary legatees, cited *Farmer* v. *Mills*, 4 Russ. 86.

Mr. Graham Hastings for the pecuniary legacies. There is nothing in this case to take it out of the rule that residuary legatees take nothing until the pecuniary legatees are satisfied.

Stuart, V.C., held that the direction for the general abatement in the codicil distinguished this case from *Farmer* v. *Mills*, and that the sum in question must be applied in satisfaction of the deficiency in the pecuniary legacies.

Lord Romilly, M.R. May 1. } *In re* Humber Iron Works.

Winding-up—Dividend—How applied—Principal and Interest.

In the winding-up of the Humber Iron Works Company a dividend had been declared upon the amount due from the company. There was owing to one of the creditors of the company, in addition to the principal of his debt, a considerable sum for interest. The question was how the dividend was to be applied towards payment of the amount due to the creditor.

Sir R. Baggallay, Mr. Southgate, Mr. Wickens, Mr. Eddis, and *Mr. Westlake* appeared in the case.

The Master of the Rolls held that the dividend ought to be applied towards payment of the principal and interest *pari passu*.

Courts of Common Law.

Exchequer Chamber. (Appeal from Q.B.) May 10. } Readhead *v.* Midland Railway Company.

Common Carriers—Railway Passenger—Negligence—Warranty of Roadworthiness—Latent Defect in Carriage.

This was an appeal against a judgment of the Court of Queen's Bench, discharging a rule obtained by the plaintiff for a new trial on the ground of misdirection.

The decision of the Court below is reported 36 Law J. Rep. (N.S.) Q.B., 181, and the following statement, taken from the judgment of this Court, will now be sufficient:—

In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he was travelling getting off the line and upsetting. The accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to 'a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking.'

The case was argued (Nov. 26, 27, 1868) by

Manisty for the plaintiff, and by

Kemplay (*Aspinall* with him) for the defendants.

Cur. adv. vult.

Per Curiam (Kelly, C.B., Willes, J., Byles, J., Bramwell, B., Channell, B., Keating, J., and Montague Smith, J.).—The judgment of the Court of Queen's Bench must be affirmed. We think that a carrier of passengers enters into no contract either of general or limited warranty and insurance to carry the passenger safely to his journey's end, or that the carriage in which he travels should be, in all respects, perfect for the purpose—that is to say, free from all defects likely to cause peril, although such defects were such that no skill, care or foresight could have detected their existence. The case for the plaintiff fails in precedent and in reason. *Judgment affirmed.*

Exchequer Chamber. (*Error from Q.B.*) May 11. } SHEPHERD *v.* HARRISON AND ANOTHER.

Consignor and Consignee—Acceptance of Bill of Exchange sent with Bill of Lading—Condition Precedent—Vesting of Property.

The plaintiff, a cotton merchant at Manchester, sent an order to P. & Co., at Pernambuco, to purchase on his account cotton upon certain terms. P. & Co. accordingly purchased and shipped cotton in the defendants' vessel, and wrote to the plaintiff, saying: 'Inclosed please find invoice and bill of lading of 200 bales of cotton. We have drawn upon you in favour of our agents, to which we beg your protection.' The invoice, which was headed 'On account and risk of S. & Co.' (the plaintiff), was sent to the plaintiff as stated in the letter; the bill of lading, however, was not inclosed therewith, but was sent to the agents of P. & Co., together with a bill of exchange for the price of the cotton. The agents of P. & Co. thereupon wrote to the plaintiff enclosing the bill of lading duly indorsed, and a bill of exchange for which they requested protection. The plaintiff retained the bill of lading, but returned the bill of exchange unaccepted, on the ground of non-compliance with the terms of the order. On presentment of the bill of lading to the defendants, they refused to deliver the cotton, having been advised of the circumstances under which it had come into the possession of the plaintiff, who thereupon sued them in trover. The Court of Queen's Bench held, upon a case embodying the above particulars, and empowering them to draw inferences of fact, that the acceptance of the bill of exchange was a condition precedent to the passing of the property, and that this having been refused, the defendants were justified in holding the cotton; whereupon the plaintiff brought error.

Jordan (*Quain* with him) was heard for the plaintiff.

Holker (*Gully* with him), for the defendants, was stopped.

The COURT (KELLY, C.B., WILLES, J., CHANNELL, B., MONTAGUE SMITH, J., and CLEASBY, B.) affirmed the judgment of the Court of Queen's Bench.

Judgment affirmed.

Exchequer Chamber. (*Error from Q. B.*) May 11. } LEVERSON *v.* REGINA.

Central Criminal Court—4 & 5 Wm. IV. c. 36—Constitution of the Court—Jurisdiction.

This was a writ of error which raised the question whether the Court, as constituted, had jurisdiction to try the defendant. The trial lasted three days, during which Mr. Kerr, as the 'judge of the Sheriffs' Court,' sat as the presiding judge. On each day an alderman of the city of London sat with Mr. Kerr, but on each day the alderman was different from the one who sat on the previous day.

Mellish (*Gibbons* with him), May 1, argued for the defendant, the plaintiff in error.

The *Solicitor-General* (*Poland* and *Archibald* with him) for the crown.

Cur. adv. vult.

The judgment of the COURT (COCKBURN, C.J., MELLOR, J., LUSH, J., and HAYES, J.) was delivered by COCKBURN, C.J.—We are of opinion that the presence of a second commissioner was unnecessary, and that the conviction is therefore good. The majority of the members of the Court think that, even if it was necessary that a commissioner should be present, such commissioner need not sit continuously all through the trial. Upon that point I entertain a contrary opinion. Upon all the points there must be judgment for the crown.

Judgment for the crown.

Exchequer Chamber. (*Appeal from Q. B.*) May 11, 12. } FLEET (ADMINISTRATRIX OF MARY ANNE ROSS) *v.* PERRINS.

Husband and Wife—Chose in Action—Acknowledgment to Wife during Coverture that Money is held to her Use—Money had and received.

Appeal from the decision of the Court of Queen's Bench, reported 37 Law J. Rep. Q. B. 233. The declaration was by the plaintiff, as administratrix of the estate and effects of Mary Ann Ross for money received by the defendant for the use of Mary Ann Ross, for money due from the defendant to Mary Anne Ross on accounts stated between them, and for money due from the defendant to the plaintiff as administratrix, upon accounts stated between the plaintiff as administratrix and the defendant.

It appeared that Thomas R. Ross was married to the intestate in February 1864, and that she shortly afterwards accompanied him to India. She died in December 1864, and he in 1866. In November 1864 the defendant wrote a letter to the wife, the intestate, in which were these words: 'I received your letter yesterday, and write by return of post, on account of your wishing me to send you the money. You will receive my letter sent by last week's mail, where I state that I have received your money and put it at interest at 7*l.* per cent.; but if you wish me to send it after you know what the banks give here, I will do so.' It was objected by the defendant that the action could not be maintained, as the husband's administrator was the only person entitled to sue for the money. The Court of Queen's Bench was of opinion that a chose in action had been conferred on the wife during coverture with which the husband did not during coverture interfere, and therefore that the action was rightly brought. The defendant now appealed from this decision.

Prentice (*Gorst* with him) contended that the action could not be maintained, as it was by the representative of a married woman for money had and received to her use, whereas the implied contract would be to hold the money to the husband's use.

J. Brown (*C. M. Griffith* with him) argued that there was no difference in principle between the chose in action in the present case and a bond or promissory note, where clearly the action would lie.

The majority of the COURT (CHANNELL, B., KEATING, J., MONTAGUE SMITH, J., and CLEASBY, B.) affirmed the decision of the Court below. The rule of law with regard to bonds and promissory notes given to a married woman was not confined to these choses in action, although they are more frequently mentioned because of an opinion which once prevailed that they would pass to the husband as chattels. The counsel for the appellant had disclaimed any wish to have the case decided upon a point of pleading, so that it was unnecessary to say whether the declaration might not have been more properly framed.

KELLY, C.B., dissented from the decision, upon the

ground—first, that there was no precedent for an action for money had and received by husband and wife; secondly, that no action could be maintained by the representative of a married woman for a chose in action where her interest did not specifically appear on the face of the instrument.

Judgment affirmed.

Queen's Bench. May 6. } DOUST *v.* SLATER.

Metropolis Local Management Acts, 18 & 19 *Vict. c.* 120, *ss.* 69, 73; 25 & 26 *Vict. c.* 102, *s.* 106—*Notice of Action.*

In this case a rule *nisi* had been obtained, pursuant to leave reserved, to set aside a verdict found for the plaintiff, and to enter the verdict for the defendant.

The defendant had received notice from the local board to make a drain from his house into the sewer; in obedience to this notice he commenced making the drain, but in doing so he cut across the land of the plaintiff, who thereupon brought this action against him. It was contended, on his behalf, that he was entitled to notice of action, as he came within the terms of 25 & 26 Vict. c. 102, s. 106, as being a person acting under the direction of the board, and as the thing he had done was intended to be done under the powers given to the board. A verdict was entered for the plaintiff, and a rule was obtained as above.

Wharton showed cause.

Edmund Thomas supported the rule.

Per Curiam (COCKBURN, C.J., LUSH, J., and HAYES, J.).—The rule must be discharged. The defendant was not acting under the direction of the board when he cut across the land of the plaintiff, and he cannot be entitled to notice of action.

Rule discharged.

Queen's Bench. May 10. } HUDSTON *v.* THE MIDLAND RAILWAY COMPANY.

Railway Company—Personal Luggage—Child's Toy—Carriers.

In this case the company had issued tickets to passengers, subject to the following regulations:—'Luggage: first-class passengers are allowed 112 lbs., second-class 100 lbs., and Government passengers 56 lbs. of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge.' In the special Act of the company, which contained similar rules respecting the conveyance of passengers, the words 'ordinary luggage' were used.

The plaintiff, who had taken a first-class ticket subject to these regulations, proposed to carry with him as personal luggage a toy like a rocking-horse, called a spring-horse, weighing 78 lbs. and measuring 44 inches in length. The question was whether this article came under the term 'luggage.'

Macnamara, for the appellant, contended that the words 'ordinary luggage' ought not to be restrained to the disadvantage of travellers, and that the article in question came within the same category as toys which would be carried with children for their amusement at any place to which they were travelling.

A. Wills (*J. C. Carter* with him) contended that the spring-horse was substantially an article of furniture, and that it was not a thing which a traveller would usually take with him.

The COURT (LUSH, J., HANNEN, J., and HAYES, J.) held that the article in question did not come under the term 'ordinary luggage.' It was extremely difficult, and perhaps impossible, to attempt to frame any description of the articles which would come under this definition, but it would be generally supposed to mean articles which a passenger would be likely to take with him, and which might, if necessary, be carried by hand. The spring-horse was an article of an entirely different nature.

Judgment for the respondents.

Queen's Bench. May 10. } MOONE *v.* ROSE.

Trespass for False Imprisonment—Undue Detention of Prisoner in Custody for Contempt—Action against Gaoler—11 *Geo. IV. and* 1 *Wm. IV. c.* 36, *s.* 15—4 *Geo. IV. c.* 64, *s.* 75.

By 11 Geo. IV. and 1 Wm. IV. c. 36, s. 15, if any defendant in equity under process of contempt for not appearing or not answering be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by a *habeas corpus* to the bar of the Court within thirty days from the time of his being actually in custody, &c.; and in case any such defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler, &c., in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of his contempt. By 4 Geo. IV. c. 64, s. 75, an Act for consolidating the laws relating to houses of correction, all actions, &c., to be commenced against any person for anything done in pursuance of the Act are to be laid and tried in the county where the facts were committed, and to be commenced within six calendar months after the facts committed.

The plaintiff, having been committed for contempt for not answering a bill in Chancery, was taken to gaol, but not brought to the bar according to the statute, and the defendant, the gaoler, did not discharge him till some months afterwards, when he brought trespass against him.

Upon a rule to enter the verdict for the defendant,

J. J. Powell and *Anderson* showed cause.

Huddleston and *Bullen*, in support of the rule, contended—first, that the form of action ought to have been case, not trespass; secondly, that the venue ought to have been local, and that the action was not brought within the time limited; thirdly, that the sheriff, and not the gaoler, was the person liable.

The COURT (LUSH, J., HANNEN, J., and HAYES, J.) discharged the rule. With regard to the Act 4 Geo. IV. c. 64, the defendant would be entitled to the benefit of the limitation as to bringing actions imposed by section 75, if the cause of action had been within the meaning of that section. But the action was for keeping the defendant in custody beyond the proper period, and not for improperly classifying him with other offenders. With regard to the objection that the sheriff was the proper person to be sued, and that the form of action against the defendant should have been case, not trespass, the gaoler was an independent officer, with duties of his own which required him to keep the plaintiff in custody and discharge him at the proper

time. In the present case he had detained the plaintiff beyond the prescribed period, and was liable in trespass.

Rule discharged.

Queen's Bench.
April 26, May 11.

REGINA *v.* THE WALLASEY LOCAL BOARD.

Local Board—Power to put Street in order upon Default of Owner of Premises fronting it—Compensation.

By the Public Health Act, 11 & 12 Vict. c. 63, s. 69, local boards may require the owners and occupiers of premises fronting upon private streets to sewer, pave, &c., parts of these streets, and upon their default may execute the works, and charge them with the expenses. By section 144, compensation is to be paid out of the general or special district rates to be levied under the Act, to all persons sustaining any damage by reason of the exercise of any of the powers of the Act. A local board, whilst putting a street in order upon the default of the owner of the premises fronting it, caused damage to these premises, and the question arose whether this was damage for which compensation ought to be awarded under section 144.

Milward (*R. G. Williams* with him) for the local board, and

G. Bruce for the claimant.

The COURT (LUSH, J., HANNEN, J., and HAYES, J.) after taking time to consider, now (May 11) delivered judgment in favour of the claimant, who was, in their opinion, entitled to compensation for a damage sustained during works by which the whole district had benefited.

Judgment for the claimant.

Queen's Bench.
May 12.

REGINA *v.* PLENTY.

Municipal Corporation Act—Election of Borough Councillor—Voting Paper containing only Initial of Christian Name of Candidate.

By the Municipal Corporation Act, 5 & 6 Wm. IV. c. 76, s. 32, every burgess entitled to vote in the election of councillors may vote for any number of persons not exceeding the number of councillors then to be chosen, by delivering to the mayor and assessors, or other presiding officer, a voting paper containing the Christian and surnames of the person for whom he votes, with their respective places of abode and descriptions, &c. By section 142 no misnomer or inaccurate description of any person, body corporate, or place named in any schedule to the Act annexed, or in any roll, list, notice, or voting paper required by the Act shall hinder the full operation of this Act with respect to such person, body corporate or place, provided that the description of such person, body corporate or place be such as to be commonly understood.

The question in this case was whether William Penford was in November, 1867, duly elected a councillor for the borough of Newbury. It appeared from the case that he was so elected if he was entitled to count as valid certain voting papers in which he was designated by the initial of his Christian name (thus, W. Penford) instead of by his Christian name and surname in full.

A. Rogers for W. Penford, the relator.

Gray for the defendant.

The COURT (LUSH, J., HANNEN, J., and HAYES, J.), after taking time to consider, now (May 12) delivered judgment, holding that the voting papers were valid, on the ground that the designation of the candidate by the initial of his Christian name was a misnomer, and therefore cured by s. 142.

Judgment for the relator.

Queen's Bench.
(*Magistrate's Case.*)
April 28, May 12.

REGINA *v.* THE GUARDIANS OF THE POOR OF EXETER.

Evidence—Entry against Interest—Settlement by Renting Tenement, 6 Geo. IV. c. 57, s. 2.

In this case a pauper was ordered to be removed to Exeter Union, on the ground that his maternal grandfather had acquired a settlement within the union by renting a tenement in a parish within it. It was proved that the grandfather had rented a house in the parish up to Midsummer 1830, and that he had been heard to say that he held it of J. Brook at 22*l.* a year, and that he had paid the rent. A book was also produced containing entries in his handwriting, to the effect that he had paid two sums of money for a quarter's rent due Midsummer 1830. The question was whether these entries could be received as evidence of the payment of the rent.

Poland, for the respondents, contended that, as declarations against proprietary interest, the entries were admissible for all purposes.

Lopes, for the respondents, contended that as it would have been the interest of the person making any such entry to falsify the discharging part, it could not be received to show the payment of the rent.

The COURT (LUSH, J., HANNEN, J., and HAYES, J.), after taking time to consider, now (May 12) delivered judgment, holding that the evidence might be received as a declaration against proprietary interest. *Regina* v. *Birmingham*, 31 LAW J. Rep. M. C. 63, was in point.

Judgment for the respondents.

Exchequer Chamber.
(*Error from Exch.*)
May 14.

SPILL *v.* MAULE.

Libel—Privilege—Presumption as to Absence of Malice.

This was a bill of exceptions to the ruling of MARTIN, B. The action was for libel, and the following facts appeared at the trial from the evidence of the plaintiff, who was the only witness examined.

The defendant was a creditor of a firm in which the plaintiff and one Briggs were partners. In 1866, the firm being in difficulties, a deed of inspectorship was prepared, which the plaintiff eventually refused to execute, after it had received the assent of the requisite majority of the creditors.

On Dec. 13, 1866, the plaintiff 'seeing' (as he said) that Briggs was helping himself, *took away from the cash-box of the firm a parcel of bills of exchange*, amounting to 1,264*l.*, telling the clerk to inform Briggs of what he had done.' On March 30, 1867, the plaintiff was arrested at the suit of a firm of which the defendant was a member, and he was subsequently made a bankrupt. Messrs. Collier & Co., creditors of the firm, having afterwards threatened Briggs with hostile proceedings, the defendant, on July 12, 1867, wrote them a letter, of which the following is an extract, containing the libel complained of:—'Gentlemen,—I think it right to inform you that Mr. Briggs has consulted Mr. Spill's assignees and myself as to certain letters which you have addressed to him. The proceedings which Mr. Briggs has been advised to take are quite in accordance with

our views; and although I have no right and no wish to dictate to you any particular line of conduct, I cannot help saying that your proceedings entirely contradict the spirit of your letters, in which you profess to act only for the benefit of the general body of creditors. I may state that *the conduct of Mr. Spill has been most disgraceful and dishonest, and the result has been to diminish most materially the available assets of the estate.*' The plaintiff was not cross-examined, and MARTIN, B., ruled that there was no evidence to go to the jury in support of his case, and directed a verdict for the defendant. A bill of exceptions was thereupon tendered on behalf of the plaintiff.

Huddleston (with him *J. O. Griffits*) argued for the plaintiff.

C. P. Butt (with him *W. S. Ollivant*) for the defendant.

The COURT (COCKBURN, C.J., KEATING, J., LUSH, J., HANNEN, J., BRETT, J., and HAYES, J.) held that, on the whole, MARTIN, B., was right, though it might have been better to have left the question of malice to the jury. They were of opinion that the defendant, as a creditor, had a direct interest in the subject-matter of the letter, and that the *occasion* being therefore privileged, absence of malice on his part must be presumed; so that it was for the plaintiff to show actual malice, either from the use of particular expressions in the letter, or from extrinsic circumstances; and that, the circumstances proved by the plaintiff himself as to the abstraction of the bills being consistent with either an honest or a dishonest course of conduct on his part, the presumption which in the first instance was in the defendant's favour must, in the absence of positive proof to the contrary, prevail throughout. They therefore gave

Judgment for the defendant.

Exchequer Chamber. (*Appeal from Exch.*) May 14. } FERRAR *v.* THE COMMISSIONERS OF SEWERS.

Compensation—City of London Sewers Act (11 & 12 *Vict. c.* 163)—*Lands Clauses Act*, 1845, *ss.* 5, 68.

The question in this case was whether the plaintiff was entitled to compensation for his premises having been injuriously affected by the execution by the defendants of certain works authorised by section 120 of the City of London Sewers Act, 1848. Section 2 of that Act incorporates the provisions of the Lands Clauses Consolidation Act, 1845, except so far as they are inconsistent therewith, or are therein declared not to extend thereto; and by section 3, the provisions of the Lands Clauses Act relating to the 'purchase and taking of lands otherwise than by agreement' are declared not to extend to the City of London Sewers Act.

Section 5 of the Lands Clauses Act enacts that, 'whereas it may be convenient in some cases to incorporate with other Acts some portion only of the Lands Clauses Act, for the purposes of making any such incorporation, it shall be sufficient in any such Act to enact that the clauses in the Lands Clauses Act, with reference to the matter intended to be incorporated—describing such matter *as it is described in the Lands Clauses Act in the words introductory to the enactment* with reference to such matter—shall be incorporated.'

The Court of Exchequer held (38 Law J. Rep. Exch. 17), that the plaintiff was entitled to compensation.

The defendants having appealed to this Court,

Joseph Brown (with him *J. O. Griffits*) contended that, as section 68 was included under the above heading (which comprises all the sections between 15 and 69), and would therefore be properly incorporated according to section 5 by the words of that heading, it was also *excluded* under the same form of words as found in section 3 of the City of London Sewers Act.

Keane (with him *Tyndall Barnard*) cited *Broadbent* v. *Imperial Gaslight Company* (26 Law J. Rep. Chanc. 276), and contended, as in the Court below, that the plaintiff was entitled to compensation.

The COURT (COCKBURN, C.J., KEATING, J., LUSH, J., HANNEN, J., BRETT, J., and HAYES, J.) held that section 68 of the Lands Clauses Act was included under the heading preceding section 16 of that Act, and was consequently *excluded under the same form of words* in section 3 of the City of London Sewers Act, and reversed the judgment of the Court below accordingly.

Judgment reversed.

Exchequer Chamber. (*Appeal from Exch.*) Feb. 6, 8, May 14. } GENERAL STEAM NAVIGATION CO. *v.* THE BRITISH AND COLONIAL STEAM NAVIGATION CO.

Compulsory Pilotage—Port of London—Merchant Shipping Act, 1854, *s.* 388—6 *Geo. IV. c.* 125.

The defendants' vessel, belonging to the port of London, being on her homeward voyage from Quebec, took on board a pilot to steer her from Dungeness to Gravesend. When between Yantlet Creek and Gravesend, she came into collision with the plaintiffs' ship, then coming down the river. The collision was admitted to have been caused by the fault of the pilot aforesaid.

The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 388, exempts the shipowner from liability for damage occasioned by the fault or incapacity of any pilot *within the district* where the employment of such pilot is compulsory. Section 59 of 6 Geo. IV. c. 125 enacts that the master of any vessel may pilot his own ship while she is *within the limits of the port* to which she belongs.

The plaintiffs contended at the trial that, Yantlet Creek being the eastern limit of the port of London, the pilot was not, at the time and place of the collision, *compulsorily* employed, and therefore that the defendants were responsible. A verdict was taken for the plaintiffs, and a rule which was afterwards obtained for a nonsuit was made absolute by the Court of Exchequer—the majority of the judges holding that, whether the collision occurred within the limits of the port of London or not, the defendants were within the exemption in the Merchant Shipping Act, 1854, s. 388, inasmuch as in either case the ship was in a district where pilotage is compulsory within the meaning of that section, and the relation of master and servant did not exist between the defendants and the pilot (see 37 Law J. Rep. (N.S.) Exch. 194).

The plaintiffs having appealed,

C. E. Pollock argued for them.

W. Williams for the defendants.

Cur. adv. vult.

The COURT (BYLES, J., KEATING, J., MELLOR, J., MONTAGUE SMITH, J., and HANNEN, J.) delivered judgment on May 14, holding that *for pilotage purposes* Gravesend was the eastern limit of the port of London, so that at the point where the accident occurred the vessel was not exempt from compulsory pilotage; also that the relation of master and servant did not exist

between the defendants and the pilot; and the defendants were therefore entitled to judgment.

Judgment affirmed accordingly.

Exchequer Chamber. (*Error from Exch.*) Dec. 4, 1868. May 14, 1869.

THE EARL OF DERBY *v.* THE BURY IMPROVEMENT COMMISSIONERS.

Nuisances Removal Act, 1855 (18 & 19 *Vict. c.* 121), *ss.* 21, 22—*Highway Act* (4 & 5 *Wm. IV. c.* 50), *s.* 67—*Bury Improvement Act* (*Local*, 9 & 10 *Vict. c.* 293), *ss.* 102, 110—*Power of Local Authority to lay down Sewer 'instead of' Sewer which has become a Nuisance.*

This was error upon a special case, upon which judgment was given for the plaintiff in the Court below by KELLY, C.B., and CHANNELL, B. (*dissentiente* MARTIN, B.). The case is reported in 37 Law J. Rep. (N.S.) 64 Exch., and L. R. 3 Exch. 121.

The defendants, who were Improvement Commissioners for Bury under a local Act, and were also the local authority within the meaning of the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), in place of an open sewage-receiving watercourse by the side of a highway, which had become a nuisance, constructed a covered sewer partly along the highway and partly across an enclosed field of the plaintiff's, where there had been no sewer previously. They justified under section 22 of the Nuisances Removal Act, 1855, which gave them the powers given to the surveyor of highways by the Highway Act (4 & 5 Wm. IV. c. 50), s. 67.

May 14.—WILLES, J., delivered the judgment of the COURT (WILLES, J., KEATING, J., HANNEN, J., BRETT, J., and HAYES, J.), reversing the judgment of the Court of Exchequer. The case involved four questions:—(1) Whether power to make new sewers was conferred on the commissioners by the Nuisances Removal Act, 1855. (2) If yea, whether the commissioners had any discretion as to the position of the sewers. (3) Whether they were shown to have abused their powers. (4) Whether their powers under the general Act were restricted by their having had powers to take the same course under the local Act after notice, which had not been given. The first two questions were decided in the affirmative, the last two in the negative.

Judgment reversed.

Exchequer. May 6.

COURTAULD *v.* LEGH.

Error—Special Case stated by Arbitrator under Order of Reference—Common Law Procedure Act, 1854, *s.* 32.

An order of reference by which an action was referred to an arbitrator provided that he should, if required by either of the parties, state a special case for the opinion of the Court, and judgment should be entered according to such opinion. Upon a special case stated, raising a point of law involved in the action, the Court gave judgment for the plaintiff. The defendant took proceedings in error, which were set aside on an application at Chambers. A rule *nisi* was obtained to rescind the order made at Chambers.

Garth and *Thesiger* now showed cause.

Pollock supported the rule.

The COURT discharged the rule, on the ground that error did not lie on the judgment, inasmuch as it was not a final judgment, and the special case was not within section 32 of the Common Law Procedure Act, 1854.

Exchequer. May 8.

MAXTED *v.* PAYNE.

Rules of Stock Exchange—Sale of Shares—Action against Jobber.

Special case. The plaintiff, who by his brokers, Sandeman & Co., members of the Stock Exchange, on May 24, 1866, sold 100 shares in Overend, Gurney & Co. (Lim.) to the defendant, who was a jobber and also a member of the Stock Exchange, now sued the defendant for the amount of calls which the plaintiff had since been compelled to pay on ten of the shares. The defence was that on the next settling day the defendant gave the name of Goss as the purchaser of the ten shares, and thereby, according to the rules of the Stock Exchange, discharged himself from liability. The case found that Sir Samuel Sprye, through his brokers, Foster & Co., also members of the Stock Exchange, had purchased ten shares of the defendant, but before the settling day he gave Goss, who was a person of no means, *4l.* 10*s.* as an inducement to take a transfer; and Goss's name was given by Foster & Co. to the defendant, who gave it to the stockbrokers. Foster & Co. acted *bona fide*. Goss was not registered as the owner of the shares, nor did he pay the calls on them; the plaintiff was compelled to pay the calls. The rules of the Stock Exchange were annexed to and formed part of the case.

April 21.—*C. Pollock* (*Herschell* with him) argued for the plaintiff.

Macnamara (*Beresford* with him) for the defendant.

May 8.—The majority of the COURT (KELLY, C.B., BRAMWELL, B., and PIGOTT, B.) gave judgment for the defendant, on the ground that the plaintiff had sold subject to the rules of the Stock Exchange, and had executed a transfer to Goss, and that the defendant had done all that he was personally bound to do by the rules.

CLEASBY, B., dissented, being of opinion that the defendant was bound to give the name of the ultimate purchaser, who was in fact Sir S. Sprye, Goss not being in reality a purchaser at all.

Judgment for the defendant.

Probate and Matrimonial Causes.

Probate.
April 20,
May 5. } *In the goods of* T. B. Sharman.

Will—Residue—Signature of Legatee Written under Attestation Clause—Omission of Name in Probate—Practice.

T. B. Sharman died, leaving a duly executed will in the words and figures following:—'I give and bequeath unto my sister, Adelaide Sharman, absolutely all my houses and land and book debts, household furniture, plate, linen, books, china, glass, books of art, drugs, hay, straw, potatoes, and everything on the said premises, horse, gig, &c., and all other chattels.'

Beneath the attestation clause was the signature of the legatee, Adelaide Sharman, and it appeared from the affidavits that she put it there at the request of one of the attesting witnesses, who thought that she ought to sign her name to the will as legatee.

Inderwick moved that administration with the will annexed should be granted to Adelaide Sharman as residuary legatee, and that her signature should be omitted from the probate.

Before entertaining the application the Court required that a notice to show cause should first be served upon the father of the deceased, the sole next of kin. The notice having been served the motion was renewed.

Lord Penzance:—In ordinary cases it is not the duty of the Court to ascertain, if there be two attesting witnesses, whether the name of a third person appearing on the face of the will was written as attesting the signature of the testator or not. But in this case it is my duty to determine that point, because the question to whom the grant should go depends upon the previous one, whether Miss Sharman has any interest or not under the will, and that further depends upon the question whether she attested the signature of the testator. I am satisfied from the evidence that she did not sign as an attesting witness. I also think that the fair meaning of the will is that the testator intended to give her everything, and that she is the residuary legatee. Administration with the will annexed will issue to her, but the grant will not include her name written at the foot of the will.

Divorce and Matrimonial Causes.
March 16, May 11. } Worsley *v.* Worsley and Wignall.

Reversion of Settlements—Deed of Separation—Alteration of Post-nuptial Settlement—22 & 23 Vict. c. 61, s. 5.

In this case a decree for dissolution of the marriage, by reason of the wife's adultery, was made in November 1868, and the matter now came before the Court on the application of the petitioner for a revision of the settlements. The question was whether a deed of separation executed by the petitioner and respondent on December 4, 1865, fell within the terms of section 5 of the 22 & 23 Vict. c. 61 as a post-nuptial settlement.

The deed was an ordinary separation deed. By it the petitioner covenanted to pay to the trustee named therein an annuity of 200*l.* a year for the maintenance of the respondent during their joint lives, the annuity to be reduced to 150*l.* a year after the decease of the petitioner, and to 50*l.* a year if the respondent remarried. It contained no provision as to her living chaste, and the covenants were to cease and determine in the event of its revocation.

Dr. Tristram for the petitioner.

Dr. Deane (with him *Searle*) for the respondent.

Lord Penzance held that the deed was clearly a post-nuptial settlement within the meaning of the fifth section of the Act, and made an order for its revision.

High Court of Admiralty.

Admiralty.
May 4, 11. } The Roecliff.

Damage—Arrest of Cargo—Lien for Freight.

All the cargo on board of a vessel at the time of a collision belonged to the same owner, but only part of that cargo was on board when the vessel was arrested in the suit for the damage. Held that the lien for the whole freight extended to every part of the cargo on board at the time of the collision.

This was a motion for release of cargo.

The Roecliff had been arrested and subsequently sold in a cause of damage brought by the owners of a vessel called the Nethania. The value of freight upon the whole cargo was about 90*l.*, but a portion only of the cargo was on board the vessel at the time of the arrest, and freight upon that portion only had been paid into Court.

Bayford, for the owner of the cargo, moved for a release. The cargo is not responsible for the damage (the Leo, Lush, 72; the Victor, *ibid.* 444), and can only be arrested for the freight. In this case the freight due upon the arrested cargo has been paid.

E. C. Clarkson for the Nethania. The same person was owner of ship and freight, and the lien for all the freight extends to every portion of the cargo.

Sir R. J. Phillimore.—It is clear that the whole of the freight upon the cargo on board the vessel at the time of the collision was responsible for that damage; and the accident of some of that cargo not being on board at the time of the arrest cannot relieve it from that obligation which it is the duty of the Court, so far as its powers extend, to enforce. I shall not release the cargo until the whole freight be paid into Court.

Decree accordingly; no order as to costs.

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Courts of Equity.

HATHERLEY, L.C.
May 25. } *Re* BATES'S AND REDGATE'S APPLICATION BY PETITION FOR PATENT.

Patent—Prior Provisional Specification—Rights under.

Messrs. Bates and Redgate filed in October, 1868, a provisional specification of an invention for improvements in lace machines, and in November Mr. Bertie filed a provisional specification of what was substantially the same invention. There was no evidence that they were not both original inventions. Bertie without delay proceeded to apply for the grant of letters patent, and they were in fact granted to him in January, 1869. Bates and Redgate, on the other hand, delayed their application for the affixing of the Great Seal till March 19, 1869; and their application by petition was now opposed by Bertie, on the ground that the grant of letters patent to them would militate against his rights under his patent.

Mr. T. Webster (common law bar) and *Mr. Everitt* appeared in support of the petition, which was opposed by

Mr. Grove and *Mr. T. Aston* (of the common law bar).

The LORD CHANCELLOR said that the existence of a prior provisional specification was no reason why the Attorney-General should not consent to the filing by a rival inventor of a second provisional specification, since a person who filed a provisional specification was not compellable to proceed with his invention, and the fruits

of the ingenuity of a rival inventor might therefore be lost to the public for a year or more if no second provisional specification were allowed to be filed. The only protection, as against a rival inventor, without fraud, to which the provisional specification entitled the person who filed one first, was that he might lodge a caveat against the grant of a patent for an invention which the advertised title showed to be similar to his. Messrs. Bates & Redgate had omitted to take this precaution; and, as Mr. Bertie had now possession in his favour, his LORDSHIP could not seal a patent in their favour, which would apparently interfere with Mr. Bertie's patent. As, however, there might possibly be something in the petitioners' patent which was not covered by Mr. Bertie's patent, they might have liberty to apply to the Attorney-General for a patent to be dated March 19, 1869, for any invention not comprised in that patent. As the matter was one of first impression, it was not a case for costs.

LORD HATHERLEY, L.C. May 25. } TENNANT *v.* TRENCHARD.

Trust Estate—Sale Ordered by Court—Application by Trustee, who is also an Incumbrancer, to have Leave to Bid at Sale.

JAMES, V.C., had refused (*antè*, p. 95) permission to the plaintiff to bid at a sale, ordered by the LORD CHANCELLOR, of an estate of which the plaintiff was managing trustee, and on which he claimed a large charge. He had not been given the conduct of the sale. The *cestuis que trust*, who were adults, objected to the plaintiff being permitted to bid. The plaintiff appealed from the VICE-CHANCELLOR'S order.

Mr. E. K. Karslake and *Mr. W. W. Karslake* appeared for the appellant.

Mr. J. Pearson and *Mr. Hume* for the defendant Trenchard, who had not been served.

Mr. Freeling and *Mr. Speed* for the *cestuis que trust*, who objected to the appellant's application.

The LORD CHANCELLOR said that it had been always held that a trustee could not, against the wish of his *cestuis que trust*, be allowed to bid at a sale ordered by the Court. His LORDSHIP thought the rule a reasonable one, as strangers were not very likely to bid against a trustee who might be supposed to know the exact value of the property, so that as against him they certainly would be unable to get it a bargain. All objections of this sort applied with peculiar force against permitting a trustee to bid who had enjoyed such peculiar opportunities as the appellant for becoming acquainted with the value of the property. No attempt had been as yet made to sell this estate. When one had been made and had proved abortive, it would be time enough to consider whether the Court should not grant liberty to Mr. Tennant to negotiate for the purchase on his own behalf. The appeal must be dismissed with costs; but the costs of counsel appearing for the defendant Trenchard, who had not been served, could not be allowed.

LORDS JUSTICES. May 22. } PETTY *v.* WILLSON.

Will, Construction of—'Money Due to me at my Decease'—Policy of Insurance.

The question in this appeal (from STUART, V.C.) was whether the proceeds of a policy of insurance on the testator's life were comprised within a bequest by him of 'any money that I may die possessed of, or which may be due or owing to me at my decease.' The VICE-CHANCELLOR had held that they were not comprised within it.

Mr. Dickinson and *Mr. Woodroffe* were for the appellant; and

Mr. Greene and *Mr. Everitt* for the respondent.

Their LORDSHIPS were of opinion that a policy of insurance was ordinarily to be considered money, and that the context in this will was not opposed to such a construction here. The testator clearly thought all money to which he was entitled was divisible into two classes, viz., money he was actually possessed of, and money which might be due to him at the time of his decease. This policy was money, and their LORDSHIPS held that it was money due to the testator at the time of his decease. It was a fanciful distinction that it was not due to him because it was payable to his representatives and not to himself. The VICE-CHANCELLOR'S declaration must therefore be reversed; but the costs, including the costs of appeal, might be paid out of the estate.

LORDS JUSTICES. May 22. } *Re* ROBERTS'S TRUSTS.

Practice—Petition of Appeal—Signed by one Counsel.

Mr. Willis applied for leave to present a petition of appeal from a decision of MALINS, V.C., signed by only one counsel. The application was grounded on the circumstance that the intending appellant had been represented by a single counsel in the Court below. It appeared that the signature of one counsel to a petition of appeal had been allowed on some former occasions.

SELWYN, L.J., said the application must be refused. Where such an application had been allowed, it had been on account of the smallness of a fund and the poverty of the parties. But no exceptional circumstances had been shown to exist in the present case.

GIFFARD, L.J., concurred.

LORDS JUSTICES. May 22. } *Re* PERUVIAN RAILWAYS COMPANY (LIMITED), SAWAR'S CASE.

Company—Nominee—Fictitious Payment of Calls.

This case is reported, when before Vice-Chancellor Malins, *antè*, p. 89.

Sir R. Palmer, *Mr. Cole*, and *Mr. Ince* appeared for the appellant Sawar, the International Contract Company's nominee; and

Mr. Glasse and *Mr. Kekewich* for the official liquidator of the Peruvian Railways Company.

SELWYN, L.J. said the real question raised by the notice of motion was whether the transaction of October 25, by which the International Company drew on their bankers checks in favour of the Peruvian Company for 488,598*l.*, and the Peruvian Company on the same day drew checks on the same bankers for the same amount in favour of the International Company, amounted in fact to payment of the 22*l.* per share, or was a mere fictitious payment. But the official liquidator now denied the validity of the agreement of September 27, 1865, by which the International Company was empowered to pay up in full all shares held by themselves or their nominees in the Peruvian Company,

and by which the amount of such payments was to be returned to the International Company as security for the repayment of their advances to the Peruvian Company. Accordingly, as the official liquidator had intimated his wish to file a bill to impeach this agreement, the Court, not having materials before it on which to decide so important a question between two insolvent companies, would grant him leave. But in order to guard against needless delay he must give an undertaking to file the bill within a month. If the bill were not then filed, any party would have liberty to apply to have this appeal motion restored to the paper, and to have the Court's judgment on the point raised by it.

GIFFARD, L.J., thought that so long as the agreement of September 27 stood, it was impossible to place Mr. Sawar on the list except as a holder of fully paid-up shares. As, however, the official liquidator of the Peruvian Company desired to file a bill to impeach that agreement, the Court could not well dispose of the case without giving him leave.

LORD ROMILLY, M.R. May 8. } *In re* MOWER'S TRUSTS.

Mortgage—Marshalling of Securities—Priority.

The owner of two properties mortgaged them to A. He then mortgaged one of them to B., and then both of them to C. The mortgage to C. recited those to A. and B., and then assigned so much of the properties as should remain after satisfaction of the prior charges. A. in exercise of his power of sale sold both properties, and, after paying himself out of the proceeds of the sale, paid 816*l.*, the residue of such proceeds, into Court under the Trustee Relief Act. The fund in Court was insufficient to satisfy B.'s claim. C. now by his petition prayed that so much of the 816*l.* as represented the residue of the proceeds of the sale of the property mortgaged to B. might be paid to B., and that the residue of the 816*l.* might be paid to himself.

Mr. Faber, for the petitioner, cited *Barnes* v. *Racster*, 1 Y. & C. C. C. 377.

Mr. W. Pearson and *Mr. Bovil*, for B., asked for the whole of the fund in Court, and contended that the case was governed by *Aldrich* v. *Cooper*, 8 Ves. 397, and not by *Barnes* v. *Racster*.

The MASTER OF THE ROLLS held that the second mortgagee was entitled to be paid in full before the third mortgagee was entitled to anything, and made an order accordingly.

LORD ROMILLY, M.R. May 22. } JERVIS *v.* ALLEN.

Practice—Order made in Chambers—Leave to Appeal Directly to Court of Appeal.

Mr. Batten moved for leave to bring before the LORDS JUSTICES directly an appeal from a decision of the MASTER OF THE ROLLS made upon a summons in Chambers.

The MASTER OF THE ROLLS, in granting the application, said that he had recently noticed a report in a newspaper of a case in which it was stated that counsel had alleged that it was a practice in this branch of the Court to allow appeals from the decisions of the chief clerk in Chambers to go directly to the LORDS JUSTICES instead of being tried before the judge in Court. HIS LORDSHIP wished to observe that such never had been the practice, nor would he ever permit it. What perhaps had given rise to the misapprehension was, that when he (LORD ROMILLY) had himself decided a case in Chambers, he thought it unnecessary to rehear it himself in Court, and in such cases he often did give leave to carry the matter to the Court of Appeal directly.

LORD ROMILLY, M.R. April 29, May 24. } ELGOOD *v.* COLE.

Will—Construction—'Surviving Family'—Special Power—Execution of by Will.

Elizabeth Cole, in exercise of certain powers of appointment, gave to her children by will, dated Oct. 28, 1833, the income of certain real and personal property until the death of the last survivor of them, with a substitutionary gift to the children of such of her children (except her daughters Maria Cole and Mary Ann Cole) as should die before that period.

On Jan. 8, 1835, the testatrix made a codicil containing the following words: 'The profits arising in my will, which I have given to my daughter Mary Ann Cole, I give to her for her life, and at her disposal by will into my surviving family, as she may think proper.' These words were followed by a gift over in case Mary Ann Cole died without a will.

Mary Ann Cole made a will on Aug. 28, 1863. After giving certain pecuniary legacies, she bequeathed all the residue of her estate to her niece Rosa Ann Cole absolutely; but the will contained no reference to any power of appointment.

Rosa Ann Cole was the grandchild of Elizabeth Cole; and the question arose whether she was a proper object of the power conferred by the codicil of Elizabeth Cole, dated Jan. 8, 1835, as coming within the description, 'my surviving family,' and whether the will of Mary Ann Cole was an execution of the power.

Mr. Coles appeared for the plaintiff, the trustee of the will of Elizabeth Cole.

Mr. W. W. Karslake for Rosa Ann Cole.

Mr. Southgate for the persons claiming under the gift over in the codicil of Jan. 8, 1835.

May 24.—The MASTER OF THE ROLLS held that Rosa Ann Cole was included in the description 'surviving family,' but that the will of Mary Ann Cole did not operate as an execution of the power.

LORD ROMILLY, M.R. May 5, 6, 25. } NORRIS *v.* CALEDONIAN INSURANCE COMPANY.

Mortgage of Policy—Premiums—Priority.

John Sadleir was the mortgagee of a policy of the Caledonian Insurance Company, and had charged it with certain sums in favour of the defendant, Vincent Scully. He kept up the policy by payment of the premiums till his death in 1856, and from that time till February 1868, when the policy money became due by the expiration of the lives insured, the premiums were paid by the plaintiff, his legal personal representative.

In 1856 decrees were made, both in the Court of Chancery here and in the Court of Chancery in Ireland, for the administration of the estate of John Sadleir.

The present bill was filed by the personal representative of John Sadleir in both countries, to enforce the claim of his estate against the policy money which had been paid into Court; and the principal question was,

whether the premiums paid to keep up the policy should be repaid out of this fund in priority to the charge of Vincent Scully.

Mr. Hardy and *Mr. Napier Higgins* were for the plaintiff.

Mr. Mackeson and *Mr. W. Cooper* for Mr. Vincent Scully.

Mr. Smart for the Caledonian Insurance Company.

Mr. Bird and *Mr. Ramadge* for other parties not interested in this question.

May 25.—The Master of the Rolls, recognising the general rule that money paid by a mortgagor for the benefit of the mortgaged premises cannot be charged on them in priority to the debt secured, disallowed the prior charge in respect to the premiums paid by Mr. Sadleir in his lifetime, but allowed it in respect to those paid since his death. His administrator was not bound to keep up the policy out of his own money, and was not at liberty to appropriate to that purpose the general assets which belonged to the general creditors. He was a trustee of the policy, whose first trust was to keep it up, and he was therefore entitled to a first charge on the money produced by it in respect of the sums paid by him for this purpose.

Lord Romilly, M.R.
May 5, 25. } Baskcomb *v.* Beckwith.

Specific Performance—Mistake.

The plaintiff offered for sale in lots an estate at Christchurch, subject to the condition that every purchaser should covenant not to carry on any trade on the land, and the defendant contracted to purchase the principal lot, containing the mansion-house. The plan of the estate induced the defendant to think that the land offered for sale included the whole property of the vendor at Christchurch, and he entered into the contract in the belief that all the surrounding land would be bound by the covenant required by the conditions of sale. He afterwards discovered that the vendor was retaining a small corner piece of land, on which he intended to erect a public-house. He thereupon refused to proceed with the purchase, and the vendor filed a bill for specific performance of the contract.

Sir R. Baggallay and *Mr. Jason Smith* were for the plaintiff.

Mr. Jessel and *Mr. Jackson* for the defendant.

The Master of the Rolls held that the defendant was not bound to complete the purchase.

James, V.C.
May 22. } Williams *v.* Ivimey.

Injunction to Restrain Action at Law—Double Remedy—Sequestration.

The plaintiff being indebted to the Rev. J. G. Storie in the sum of 15,000*l.*, as the purchase-money of the advowson of the vicarage of St. Giles, Camberwell, subject to certain mortgages thereon, executed on February 21, 1846, eight mortgages of the equity of redemption thereof for securing such purchase-money, each mortgage containing a covenant for payment of principal and interest at 5 per cent. interest at the time therein mentioned, but no covenant for payment of interest after default.

As a collateral security he also gave a warrant of attorney, authorising judgment to be entered up against him, as in an action of debt for the sum of 30,000*l.* and costs, to secure payment of 10,000*l.* on February 21, 1847, and 5,000*l.* on February 21, 1849, with interest at 5 per cent.

Shortly afterwards the living became vacant, whereupon the plaintiff presented himself, and continued to hold it down to the date of the suit. In the same year the interest of the Rev. J. G. Storie in the said debt and the securities for the same became vested in the defendant, who, on December 3, 1846, sued out a writ of *fi. fa. de bonis ecclesiasticis* upon the judgment which had been entered up in pursuance of the warrant of attorney, whereby the bishop was directed to levy the sum of 15,322*l.* 4*s.* (the whole amount of principal and interest then remaining unpaid), with interest thereon at 4 per cent. from that date. Owing to prior sequestrations and other reasons the sequestration had produced less than half the required amount up to December, 1868, and it was doubted whether more than 4 per cent. interest could be levied (1 & 2 Vict. c. 110, s. 17). The defendant therefore resorted to his other remedy under the mortgage deeds; but as the prior mortgagees had foreclosed, he could only bring an action on the covenants for payment. This action the plaintiff now moved to restrain on the ground that judgment had already been recovered in respect of the same debt. He had already pleaded at law, by way of equitable defence, to the same effect.

Mr. Prideaux and *Mr. Herbert Smith*, for the motion, represented that the plaintiff was without defence at law, since technically the judgment recovered was for a different cause of action, the one being on assumpsit and the other on covenant, whereas in equity the claim would be the same on both grounds; and they disputed the claim for 5 per cent. interest after default, in the absence of express provision to that effect in the mortgage deeds.

Mr. Little and *Mr. Everitt* for the defendant.

The Vice-Chancellor was of opinion that, as the fact of judgment having been entered up for the same debt at the same time would afford no answer to an action on the covenant, so neither could execution (without full satisfaction of the debt) make any difference either at law or in equity. As to the rate of interest, if the defendant was entitled to 5 per cent. at law, he would be equally entitled to it in equity. On the other hand, the plaintiff would be equally entitled in any Court to be allowed whatever sums might have been actually received under the sequestration.

Motion refused; costs reserved to the hearing.

James, V.C.
May 22. } Rabbits *v.* Woodward.

Practice—Sequestration—Insufficient Lay Property.

The plaintiff in the above suit, the Rev. Cicero Rabbits, rector of Wanstrow, Somerset, had been ordered to pay 329*l.* 9*s.* 9*d.* into Court, and on his failing to do so, a commission of sequestration had been issued against him. The sequestrators returned that he had some lay property, but that the rents and profits thereof were not sufficient to produce the above sum.

Mr. Rogers, on behalf of the defendant, now moved for a writ of *sequestrari facias de bonis ecclesiasticis* (Cons. Ord. xxix. rule 11.

The Vice-Chancellor granted the application, but directed a special recital to be inserted in the order, to

the effect that it appeared the plaintiff's property, other than ecclesiastical, was insufficient for the payment of the debt.

STUART, V.C. May 22. } *Re* THE UNION CEMENT AND BRICK COMPANY (LIMITED.)

Company—Winding-up—Official Liquidator, Change of Solicitor by—Claim by late Solicitor to a Lien on the Documents relating to the Winding-up.

The above-named company had been ordered to be wound up. In the course of the proceedings for that purpose, an order had been made discharging the solicitor of the official liquidator, who had till then conducted the proceedings. The official liquidator had since appointed a new solicitor to act for him. The late solicitor, however, claimed to have a lien for his unpaid bill of costs on the documents still in his hands, which related to the winding-up. The matter now came on upon an application by the official liquidator for an order to compel his late solicitor to deliver up to him the documents in question.

Mr. Dickinson and *Mr. Everitt* appeared for the official liquidator.

Mr. Greene and *Mr. Brooksbank* were for the late solicitor of the company.

STUART, V.C., said he had no doubt as to the order to be made on this motion. The question on it had been so raised that it was necessary to look, to some extent, at the position and duties of an official liquidator of a company and his solicitor. Both were persons appointed by, or with the sanction of, the Court, for the purpose of carrying out the winding-up of the company; and neither of them could be for a moment allowed to do any act that would baffle the attempts of the Court to effect that object. Everything, however, with reference to the rights and duties of an official liquidator must be regulated by the Companies Act of 1862, which called him into existence. In this case the late solicitor of the liquidator was dismissed by the Court; and it became the duty of the liquidator and his new solicitor to prosecute the winding-up. One of the reasons for discharging the former solicitor was, that he would not concur in settling the list of contributories. He at first baffled the Court when he was the solicitor, and he now sought still further to impede the winding-up, by insisting on a lien upon the documents—not of his late client, the official liquidator, but of the company. Under all the circumstances of the case he must deliver up the documents in question to the liquidator, and must pay the costs of this application.

JAMES, V.C. May 24. } WILSON *v.* HAMMONDS.

Pleading—Negative Plea Unaccompanied by Answer.

By settlement dated November 16, 1855, certain estates were limited (subject to terms vested in trustees) to William Langham Hazlerigge Le Hunte Wilson for life, without impeachment of waste, with remainder to his first and other sons successively in tail male, remainders over. The present bill was filed against the tenant for life and his wife and the trustees, by a person who alleged his title in the following manner:—'On or about the 12th day of January, 1858, the said defendant, W. L. H. L. Wilson, who was then a bachelor, intermarried with the defendant, Barbara Catherine Wilson, by whom he had one son only, namely, the plaintiff, William Francis Lucan Doyle Le Hunte Wilson, who was born on the 12th day of July, 1860, and the plaintiff is the first and only son of the said W. L. H. L. Wilson, and as such is entitled to the said trust and settled property as tenant in tail in remainder, expectant on the death of the said defendant, his father,' &c. To this bill the defendant pleaded simply, 'the plaintiff is not the son of this defendant as in the bill alleged.'

Mr. C. Hall and *Mr. Fischer*, in support of the plea, argued that according to the present practice such a negative plea was admissible, and need not be accompanied by an answer.

Mr. Speed and *Mr. T. A. Roberts*, for the plaintiff, insisted that, having alleged facts inconsistent with the truth of the plea, he was entitled to an answer as to those facts, or at all events that the plea ought to show the nature of the case relied on by the defendant—*e.g.*, whether it was intended to dispute his identity or his legitimacy.

JAMES, V.C., overruled the plea on the principle of *Barrs* v. *Fewkes*, 33 Law J. Rep. Chanc. 484, though he thought the bill had been so framed as rather to invite it, since according to the maxim 'pater est quem nuptiæ demonstrant,' the allegation was not absolutely inconsistent with the plaintiff's being really the son of some other father. But, taking the bill and interrogatories together, it was clear that certain facts had been interrogated to for the purpose of making out that which the defendant denied, namely, that the plaintiff was his son, and he ought to answer accordingly.

JAMES, V.C. May 24. } THE JOINT-STOCK DISCOUNT COMPANY (LIMITED) *v.* BROWN.

Practice—Administrator ad litem—Suit against Trustees—Death of a Defendant Insolvent.

Bill seeking to make defendants liable for a breach of trust in respect of certain acts done by them as directors of the above-mentioned company. Henry White, one of the defendants, had died abroad insolvent. It appeared that he had made a will, by which it was believed an executor had been appointed, but his will had not been proved, nor had administration been taken out to his estate. His widow was abroad, and no information as to the representation of the deceased could be obtained from her or the former solicitors of the deceased.

Mr. Little and *Mr. Locock Webb* now asked that the Court would appoint an administrator *ad litem* to the deceased under section 44 of the Improvement of Jurisdiction of Equity Act (15 & 16 Vict. c. 86).

Mr. Willcock, *Mr. Kay*, *Mr. Karslake*, *Mr. Eddis*, *Mr. Fooks*, *Mr. Cracknall*, *Mr. Kekewich*, and *Mr. Hemming* appeared for the defendants, and discussed the power of the Court to make the order.

JAMES, V.C., said there were no words confining the effect of the statute, and the authorities did not limit the application of it. The plaintiffs must not be put at arm's length because one of the defendants was dead. The order would be for the appointment of the gentleman proposed by the plaintiffs as administrator *ad litem*, unless upon notice to the solicitors and widow of the deceased defendant they or some one of them should within fourteen days appear and consent to be appointed.

James, V.C.
April 27, 28.
May 1, 24.
} Pike *v.* Nicholas.

Copyright—Injunction—Literary Piracy—Appropriation of Substance—Alteration of Language—Damages.

Suit to restrain an infringement of plaintiff's copyright and for consequential relief. In 1865 and 1866 the Welsh National Eisteddfod offered a prize for the best essay on the origin of the English nation. The plaintiff and defendant both competed for this prize in 1865. The plaintiff subsequently, in May 1866, published his essay, under the title of 'The English and their Origin.' In 1866, after such publication, the defendant sent in another essay to compete for the prize in that year. This essay did not gain the prize, but was in some respects praised by Lord Strangford, the appointed adjudicator, as being, although a 'second-hand' work, the production of a man of 'great literary ability;' and in March, 1868, the defendant published this essay under the title, 'The Pedigree of the English People.' The plaintiff complained that the plan and substance of the third and most important part of the defendant's work had been copied from his own. The defendant had followed the same order of arrangement, discussed the same questions, gone into the same speculations and theories, used the same arguments, referred to the same authorities, and adopted the same conclusions as the plaintiff throughout the third part of his book, but he had altered the language so as to leave it identical with the plaintiff's in only a few passages. In his answer the defendant stated that his book was written before he had seen plaintiff's; but on his cross-examination in Court he admitted that he had re-written one of the chapters after seeing plaintiff's book. He was unable to state the times and places when and where he had collected his materials, consulted several of the authorities cited, which were rare books, and written his work.

Mr. Grove and *Mr. Jemmett* were for the plaintiff.

Mr. Kay and *Mr. Osborne Morgan* for the defendant.

James, V.C., said a comparison of the two works led him from the internal evidence to the conclusion that the part of the defendant's work complained of was a 'palpable crib' from the plaintiff's. The result of the defendant's cross-examination confirmed that view. The question then was between a legitimate and a piratical use of plaintiff's work. The defendant had used literary labour and skill in his transposition and transfusion of plaintiff's work. Plaintiff had no monopoly in the theories, speculations, or even the results of observations given in his published work. But no one had a right to take a substantial and material part of it for the purpose of improving a rival publication. Defendant had done so, and plaintiff was entitled to an injunction and damages. In assessing the damages, the defendant was to account for every copy of his book sold as if it had been a copy of the plaintiff's.

Courts of Common Law.

Queen's Bench.
May 12.
} Mispin *v.* Attwood.

County Court Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 33—*Costs—Action in the Superior Court—Statute of Gloucester*, 6 *Edw. I. c.* 1—*Repeal of Statute—Lord Brougham's Act* (13 & 14 *Vict. c.* 21), *s.* 5.

Rule calling upon the defendant to show cause why the plaintiff's costs should not be taxed by the Master.

The action, which was for goods sold, was commenced before the passing of the County Court Act, 1867, and was tried, by order of a judge in a County Court, after that Act came into operation. The verdict was for 13*l.*, and the Master declined to tax the costs of the plaintiff. It was not a case of concurrent jurisdiction, nor had any order or certificate been granted under 30 & 31 Vict. c. 142, s. 33.

Holl showed cause against the rule (Nov. 16, 1868), and contended that there was no power to give the plaintiff his costs, the 15 & 16 Vict. c. 54 having been repealed by 30 & 31 Vict. c. 142, s. 33, and the Statute of Gloucester being no longer in existence.

Kemplay, in support of the rule, contended that the Statute of Gloucester had only been modified in such cases, and was still in existence.

Cur. adv. vult.

Hayes, J., now delivered the judgment of himself and Lush, J., discharging the rule, holding that the plaintiff was not entitled to his costs.

Hannen, J., dissented, and delivered judgment that, in his opinion, the plaintiff was entitled to his costs under the Statute of Gloucester.

Rule discharged.

Queen's Bench.
May 22.
} Zunz *v.* The South Eastern Railway Company.

Railway Company—Passengers' Luggage—Special Contract—Limit of Liability—Foreign Line—Signature of Contract—The Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31) *ss.* 2 & 7.

This was an action brought against the defendants to recover damages in respect of the loss of certain luggage of the plaintiff, a passenger upon the railway of the defendants.

The plaintiff took a through ticket and paid his fare

to the defendants for his passage from London to Paris. He paid also a sum of 3*s.* in respect of his luggage, because it was in excess of the weight he was allowed to carry free. In the course of his journey he would have to travel by the defendants' line to Dover, thence by boat to Calais, thence by the Great Northern Railway of France to Paris. His luggage was lost between Calais and Paris.

At the trial the verdict was entered for the plaintiff, and the question which was raised upon this rule was whether the defendants were protected by reason of their having limited their liability by special contract to losses occurring upon their own line. The ticket which was handed to the plaintiff contained the following words:—

'The English railway companies are not responsible for loss, or detention of, or injury to, luggage of the passenger travelling by this through ticket, except while the passenger is travelling by their trains or boats, and in the latter case only where the passenger complies with the bye-laws and regulations of the companies; and in no case for luggage of greater value than 5*l.* Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies, such through 'booking' being only for the convenience of the passenger. Nor will the companies be responsible for the trains or boats being delayed or not meeting the trains in correspondence, nor for any consequences that may result to a passenger thereby.

H. James, Baker Greene, and *Macrae Moir* showed cause against the rule, contending that the Railway and Canal Traffic Act, 1854, applied to passengers' luggage as well as to goods; and that, although the defendants might limit their liability by a special contract if they chose to do so, such contract must be signed by the passenger, according to the provisions of section 7 of the statute. The special contract relied upon by the defendants had not been so signed, and therefore the defendants were liable in the action.

Field and *F. M. White* supported the rule.

Per Curiam (COCKBURN, C.J., MELLOR, J., LUSH, J. and HAYES, J.).—Section 7 of the Railway and Canal Traffic Act, 1854, must be read by the light of section 2, and then it will appear that the special contract, which under section 7 must be signed, is one which relates only to the railway belonging to or worked by the defendants. Here the luggage was lost upon the Great Northern Railway of France, and therefore it was not necessary that the defendants should obtain the signature of the plaintiff in order to avail themselves of the protection afforded by the special contract.

Rule absolute.

Exchequer Chamber.
(Error from Exch.)
May 14.

PARKES *v.* PRESCOTT & ANOTHER.

Libel—Publication—Authority to Publish—Evidence of.

Bill of exceptions to the ruling of MARTIN, B., that there was no evidence of publication of a libel.

The libels complained of were reports in local newspapers of certain proceedings at a meeting of a board of guardians. At the meeting in question a discussion took place about the conduct of the plaintiff towards his daughter, who was then an inmate of the workhouse; the remarks made and account given of his conduct were of a highly defamatory character. The defendant Prescott was the chairman of the meeting, and the other defendant was also present taking part in the proceedings. Reporters for the local newspapers in which the libel appeared were present. The defendant Ellis said at the meeting he hoped the local press would take notice of this very scandalous case, and requested the chairman to give an outline of it, which was done. Prescott said, while making a statement relative to the costs of the case, 'I am glad gentlemen of the press are in the room, and I hope they will take notice of it.' The defendant Ellis then said, 'So do I.'

It was contended, for the defendant, that the words used did not amount to a request to publish a libel, but merely the expression of a hope that the press would take notice of the case; and that what occurred could be no evidence of a request to publish the particular libels which appeared. On the other hand, it was contended that there was, at any rate, evidence for the jury of an authority to publish the libels complained of.

Giffard for the plaintiff.

Philbrick for the defendants.

The majority of the COURT (KEATING, J., MONTAGUE SMITH, J., and HANNEN, J.) were of opinion that there was evidence to go to the jury, and therefore there must be a *venire de novo.*

BYLES, J., and MELLOR, J., dissented from this opinion.

Judgment for plaintiff.

Ecclesiastical Cases.

Court of Arches. April 23, 30. } RIPPIN AND WILSON *v.* BASTIN.

Church Rate—Money Advanced by Commissioners for Public Works for Enlarging the Accommodation in the Church—Money Expended on Chancel—5 Geo. IV. c. 36, s. 1.

This was a suit for subtraction of church rate brought by letters of request under the hands of the Vicar General and Official Principal of the Consistorial Court of Lincoln, and promoted by John Rippin and Benjamin John Wilson, the churchwardens of the parish of Harmston, in the diocese and county of Lincoln, against John Bastin, an inhabitant and ratepayer of such parish. The libel stated that in the year 1867, the parish church of Harmston being in a very dilapidated state, on May 2 it was determined, at a meeting in vestry of the parishioners and occupiers assessed to the relief of the poor of the said parish, that the sum of money requisite for the purpose of repairing, reseating, and otherwise extending the accommodation in such church amounted to the sum of 1,076*l.* 10*s.*, and that the churchwardens and overseers of the poor of the parish should, with the consent of the bishop of the diocese and the incumbent of the parish, make application to the Commissioners for Public Works, under the provisions of the 5 Geo. IV. c. 36, for a loan of the sum of 775*l.*, being part of the sum of money requisite for the purpose aforesaid. No amendment was moved to such resolutions, and no poll was demanded. It further stated that the bishop of the diocese and the incumbent of the parish had consented to the application, that the money was advanced and expended for the purposes set out in the application, and that the first instalment of the loan had become due and been demanded, and a rate had been made to meet the demand, which the defendant, among others, had refused to pay.

An allegation was brought in on the part of the defendant to the effect that the burden of repairing the chancel of the church was by law imposed upon the impropriate rector thereof, that a considerable portion of the money advanced by the Commissioners was improperly expended in repairs and alterations done in and upon the chancel, and that therefore the pretended rate was not duly made under the provisions of the Act, but was null and void.

Prideaux (with him *Dr. Middleton*), for the churchwardens, opposed the admission of the allegation.

Dr. Deane (with him *Bayford*), for the defendant, supported it, and referred to *White* v. *Steele*, 12 C.B. (N.S.) 382; s.c. 31 Law J. Rep. (N.S.) C.B. 265.

Sir R. J. PHILLIMORE.—The plea raises two questions of law—first, whether the words in the statute which relate to the 'rebuilding, repairing, enlarging, and otherwise extending the accommodation in any church,' include the chancel or not; and secondly, whether, assuming that the statute does not provide for the repair or alteration of the chancel, an improper expenditure of the money properly raised in compliance with the provisions of the Act can have a retroactive effect so as to invalidate the original rate. As to the first question, I think that the term 'church' in the statute includes the chancel. I think that the Legislature used the word in its usual and common sense of including the whole building, and that manifest inconvenience would result from any other construction. There remains the second question, whether, supposing I am wrong in holding that the Legislature intended to include the chancel, and that a portion of the money was improperly applied to the repairs of the chancel—whether such improper expenditure could have a retroactive effect so as to vitiate the original rate? I am of opinion that it would not; and I think, therefore, that upon both grounds this responsive plea is inadmissible. The order that I will make is that the plea be sent back for the purpose of being reformed in respect of those matters which have formed the subject of my judgment; and if the parties desire permission to appeal, I shall of course give it.

Consistory Court of London. March 27, May 7. } EVANS *v.* SEACK AND SMITH.

Faculty—Reseating a Church—Opposition of the Parishioners—No increased Accommodation—Refusal of Faculty.

This was an application by the Rev. Alfred Bowen Evans, clerk, D.D., rector of the parish of St. Mary-le-Strand, in the county of Middlesex, for a faculty authorising him to make certain alterations in the fittings and furniture of the church at his own expense. The defendants, the churchwardens, acting on behalf of the parishioners, opposed the grant of the faculty.

Dr. Deane (with him *Dr. Tristram*) for the plaintiff.

A. J. Stephens (with him *Dr. Middleton*) for the defendants.

Sir T. TWISS refused to grant the faculty, the applicant having failed to prove either that the existing arrangements in the fittings of the church were so inconvenient and uncomfortable as to deter the parishioners from attending divine service in it, or that the proposed alterations were so clearly for the increased comfort and advantage of the parishioners as should induce the Court to overrule their opposition.

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LORD ROMILLY, M.R. May 7, 26. } *Re* GRAY, A SOLICITOR.

Solicitor—Retainer—False Affidavit—Penalty.

The Incorporated Law Society presented a petition stating that Mr. Gray, a solicitor, had been guilty of filing a bill in the name of a person whose authority he had never obtained, and whom, indeed, he had never seen, thereby inflicting serious injury upon him, and of permitting a client to swear an affidavit containing, to the knowledge of Mr. Gray, a false date.

Mr. F. O. Haynes appeared in support of the petition.

Mr. Gray defended himself in person.

May 26.—The MASTER OF THE ROLLS found that the charges had been made out, and directed that Mr. Gray's certificate should be suspended for ten years; but intimated that he might diminish the period if he found that Mr. Gray had made some proper reparation to his victims.

LORD ROMILLY, M.R.
April 28, 29, May 3, May 27. } SMITH *v.* WEGUELIN.

Foreign Contract—Hypothecation.

In 1862 the Government of Peru, by its minister accredited to this Court, negotiated a loan to the amount of 5,500,000*l.*, and as security for performance of the stipulations of the loan, hypothecated the whole of the guano which should be imported into the United Kingdom and the British colonies, and into the kingdom of Belgium, and the proceeds resulting from the sale of such guano after certain specified deductions had been made.

At the time when this loan was negotiated the Government of Peru was under a contract with a company in Peru, by which it engaged to consign to the agents of that company all the guano which should, during a fixed period, be shipped from the Peruvian guano beds for the consumption of the United Kingdom. The contract provided that the company should hold in London the net proceeds of the sale of the guano, after the payment of certain expenses, at the disposal of the Peruvian Government, and should set apart preferentially the amounts necessary to provide for the service of the Anglo-Peruvian debt (contracted at an earlier date) then existing.

The present bill was filed by one of the bondholders of the loan of 1862 (on behalf of all the bondholders) against the Republic of Peru, the consignment company, and Messrs. Thompson, Bonar & Co., the agents in London of the company. It complained that the conditions of the loan had not been observed, and it prayed that all guano in the United Kingdom and the British colonies, or consigned thereto, and in the possession of the consignment company or Messrs. Thompson, Bonar & Co., or their agents, or to come into their possession, might be applied under the direction of the Court in accordance with the terms of the hypothecation thereof. The alleged injury was committed in the following manner:—

One of the terms of the loan was that a certain sum (consisting of 440,000*l.*, together with the interest which would have been payable on any bonds already redeemed and cancelled) should be applied every year to the redemption of the bonds by two half-yearly payments. If the price of the bonds was above par, the Government was to be at liberty to redeem at par, the bonds being selected for this purpose by lot. If the price was below par, the redemption was to be effected by purchases at the market price until the whole sum applicable had been exhausted.

The stipulated sum was applied in accordance with these provisions on January 1 and July 1 in every year up to and including July 1, 1865.

On the subsequent half-yearly days the proper sum had been applied to the redemption of bonds, but the plaintiff alleged that this had been done in a mode at variance with the terms of the hypothecation and injurious to the remaining bondholders.

The facts on which this charge was grounded were these:—In the year 1865 the Peruvian Government contracted a new loan in this country; in some instances payment of the bonds of the new loan was made, not in cash, but in bonds of the loan of 1862, which the Peruvian Government thereupon cancelled; and the sum applicable half-yearly to the redemption of the bonds of 1862 had since July 1, 1865, been applied to redemption of these cancelled bonds at 83½, the price at which the bonds of 1865 were issued. If this sum had been applied (as the plaintiff contended it ought) to the redemption of other bonds remaining outstanding, the number of bonds in the market would have been further reduced, and their price would have risen accordingly. If it had been applied to the purchase of bonds at a lower rate than 83½, it would have purchased a greater number of them, and in this way also the number would have been reduced and the market price raised, to the advantage of the remaining bondholders; and the plaintiff contended that they might have been bought at a lower rate. He showed that at the dates of the several operations complained of, the price of the bonds on the London Stock Exchange was considerably below 83½, and explained that the excessive price given was no injury to the Peruvian Government, since they were buying from themselves.

The plaintiff accordingly sought the relief above described. The bondholders of 1865 were represented by Mr. Ayers (one of their number), who was made a defendant.

The Consignment Company entered an appearance to the bill. The Peruvian Government did not.

Mr. Jessel and *Mr. Westlake* for the plaintiff.

Mr. Southgate and *Mr. Charles Hall* for Messrs. Thompson, Bonar & Co.

Sir Roundell Palmer and *Mr. Kekewich*, for the Consignment Company, argued that the facts alleged by the plaintiff did not afford him any ground of complaint; and if they did, he could assert his right only against a sum to be ascertained by taking accounts between a foreign Government and a foreign company on the footing of a foreign contract.

Mr. Fry appeared for Mr. Ayers.

May 27.—The MASTER OF THE ROLLS, on grounds similar to those urged on behalf of the Consignment Company, held that the plaintiff had no title to the relief prayed, and ordered his bill to be dismissed with costs.

LORD ROMILLY, M.R.
May 27. } *In re* GENERAL ESTATES CO. WRIGHT AND GAMBLE'S CASE.

Adjourned Summons—Proof of Debt—Costs.

In the winding-up of the General Estates Co. Messrs. Wright & Gamble had succeeded in proving their debt. Their claim had been opposed by the official liquidator in expensive proceedings, including examinations before a special examiner. The decision was given in Court on an adjournment from Chambers, and the MASTER OF THE ROLLS had on that occasion directed that the costs of all parties should come out of the estate.

Mr. Swanston and *Mr. Cecil Russell*, for Messrs. Wright & Gamble, now moved that their costs of the proceedings in Chambers should be paid out of the estate, and contended that the order of the Court on the former occasion should be construed to direct such payment.

Mr. Roxburgh and *Mr. Edmund James*, for the official liquidator, were not called upon.

The MASTER OF THE ROLLS said the question was what decision he had already pronounced when he directed that the costs should be paid out of the estates: he meant the costs of the hearing in Court. If he had intended to include the costs of the proceedings in Chambers, that would have been expressly specified.

LORD ROMILLY, M.R. May 27, 28. } CARDWELL *v.* THE SEAMAN'S HOSPITAL SOCIETY.

Mortmain—Private Act—Construction.

In this case the question arose whether the Shipwrecked Fishermen and Mariners' Royal Benevolent Society was competent to take real estate by devise. The society was incorporated by Act of Parliament in 1850, and the question depended on the construction of that Act.

Mr. Mackeson and *Mr. Ellis* for the society.

Sir R. Baggallay and *Mr. Watson, contra.*

Mr. Swanston and *Mr. Hughes* appeared for other parties.

May 28.—The MASTER OF THE ROLLS held that the Act was intended to enable the corporation to hold land for certain limited purposes, but did not authorise it to take real estate by devise.

LORD ROMILLY, M.R. May 29. } *In re* THE COMMERCIAL BANKING CORPORATION OF INDIA (WILSON'S CASE).

Company—Winding-up—Contributory—Infancy—Acquiescence.

This was an application by Mr. Wilson to have his name removed from the list of contributories of the above company, on which he had been placed in respect of certain shares which were transferred to him during his minority. He attained twenty-one in January 1867.

The list of contributories was settled under the winding-up of the above company on December 8, 1866.

A summons to show cause why a call should not be made was taken out on August 9, 1867, and served on the applicant in Bombay, being made returnable in November 1867. On October 13, 1867, applicant's solicitors in London entered an appearance for him, and on behalf of him as well as of several other contributories, their clients, opposed the call. The call was, however, ordered to be made on December 19, 1867.

The present summons was taken out on April 7, 1869.

Mr. Roxburgh and *Mr. Ince* in support of the application.

Mr. Baggallay and *Mr. Kekewich*, for the official liquidator, contended that the applicant, by opposing the call and by his delay, had acquiesced in and accepted his position as shareholder.

The MASTER OF THE ROLLS said that he did not think that the fact that the solicitors, whom the applicant had consulted, included him among a great number of other clients, for whom they appeared to resist the call, amounted to such complete acquiescence as to bind the applicant, who, at the date of the winding-up order, was still an infant. Mr. Wilson's name must be taken off the list.

LORD ROMILLY, M.R. May 29. } *In re* THE CONSTANTINOPLE AND ALEXANDRA HOTELS CO. (FINUCANE'S CASE).

Company—Winding-up—Allotment—Contributory—Post—Evidence.

This was an application by Mr. Finucane to have his name removed from the list of contributories, on which he had been placed in respect of fifty shares.

Mr. Finucane had, on December 12, 1863, applied by letter, dated from No. 117 Aldersgate Street, for fifty shares, and, as sworn by himself, had never received any letter of allotment or any other communication from the company until he was served with a notice to settle the list of contributories. Nothing was payable in respect of this company's shares on allotment, nor was any call made until after the winding-up.

On the other hand, the official liquidator put in evidence which proved that a letter had, on December 21, 1863, been posted to Mr. Finucane, addressed to him at No. 117 Aldersgate Street, allotting to him the fifty shares.

It was proved that there were two houses some five or six doors apart from each other, and both numbered 117 Aldersgate Street, one being occupied by Mr. Finucane, the other by the offices of the *City Press*. It was stated that the letter of allotment had never been returned through the post or otherwise to the company.

At the present hearing the applicant, by an affidavit, stated (what he had not mentioned on the hearing before the Chief Clerk in Chambers) that he was not possessed of property to the value of 5*l.*

Mr. J. Chitty, for the applicant, contended that, until it could be shown that the letter of allotment reached him, he was not a member. Consequently the rules about notice by post in sections 62 and 63 of the Company's Act, 1862, and sections 95-97 of Table A., had no application.

Mr. Bevir for the official liquidator.

The MASTER OF THE ROLLS said that the name of the applicant must be removed from the list. The official liquidator would have his costs out of the estate, but the applicant would have no costs; for had he disclosed his poverty at an earlier period, the case would not have been brought into Court.

LORD ROMILLY, M.R. May 28, 31. } JELLEY *v.* TAYLOR.

Trustee for Sale, Purchase by—Undervalue—Liability for Difference.

The testator in this cause appointed the defendants trustees for sale of his estate. He owned several leasehold houses at Woolwich, and had expressed a wish that they should not be sold out of his family. One of the trustees (Jelley) was his son, the other (Taylor) was his son-in-law, and the proceeds of the sale were divisible equally among his seven children, except that one, the plaintiff, took only a life interest in his seventh share.

The trustee Jelley divided the houses in lots, and put a price on them for the purpose of sale to the children of the testator. These prices were arrived at partly by calculation from the sums given by the testator when he purchased, partly by the estimate of a licensed valuer not in practice. After the other children had made their selection, the defendant Taylor purchased the remaining lot for his wife (one of the testator's daughters) at the estimated value of 2,089*l.*

Before the prices had been settled, as above mentioned, by the defendant Jelley, the plaintiff had caused a valuation to be made by a valuer of the highest repute in Woolwich, who estimated the lot purchased by Taylor at 2,395*l.*, and he filed the present bill to make the trustees liable for the difference, as having sold to one of themselves at an undervalue. The reason why he did not seek to set aside the sale was, that since it took place the value of property at Woolwich had fallen considerably, owing to the discontinuance of the Government factory.

The bill also prayed for administration of the testator's estate, although it had been completely administered so far as that could be done in the lifetime of the widow, who had died only a few days before the hearing.

Mr. Jessel and *Mr. Woodroffe* were for the plaintiff.

Mr. Roxburgh and *Mr. Graham Hastings* for the defendant.

May 31.—The Master of the Rolls said that the case was not the ordinary one of a trustee purchasing for his own benefit, and the relief sought was entirely novel. Moreover, the property was admitted to be of variable value, and he could not assume that the estimate of one valuer was right and that of the other was wrong. Nor could he direct an inquiry what the value of such property was a year and a half ago. The bill therefore must be dismissed so far as it raised this contention, with costs up to and including the hearing. As to the administration, the plaintiff was entitled to the ordinary decree, but the costs subsequent to the hearing should be specially reserved in order that he might be made to pay them if he failed to establish error in the accounts rendered by the trustees.

Stuart, V.C.
Jan. 25, 26,
April 21,
May 25, 26.

O'Malley *v.* Blease.

Husband and Wife—Settlement—Separation Deed—Assignment by the Husband, of Shares not in the Settlement, to the Trustee of the Deed, for the Benefit of the Wife—Re-cohabitation of the Parties—Right of the Husband to the Shares.

The object of this suit was to enforce the trusts of a separation deed, and, so far as might be necessary, those of a marriage settlement.

The plaintiff, Mrs. O'Malley, was married to the defendant, Middleton O'Malley, in August, 1855; and by the settlement then executed, certain sums of stock and other personal property belonging to the plaintiff, and amounting in value to about 15,000*l.*, were assigned to trustees, upon trust, out of the income thereof to pay a sum of 50*l.* per annum to Mr. O'Malley for his life, and subject thereto, to pay the residue of the income to the plaintiff for her separate use, without any restraint on anticipation; and if Mr. O'Malley died in the lifetime of the plaintiff, the whole of the settled property was to be hers absolutely. There were certain trusts for the issue of the marriage; but if Mr. O'Malley survived his wife, and there was no issue, or they failed to take under the settlement, he was to have one half the income for his life, and Mrs. O'Malley was to have power to appoint the whole of the capital of the property by will. In default of and subject to such appointment, one half of the whole property was to go to Mr. O'Malley absolutely, and the other half to Mrs. O'Malley's next of kin. The settlement contained a proviso enabling the plaintiff at any time to direct the trustees (in writing) to vary the securities. When the settlement was executed, Mrs. O'Malley had thirty-five shares in the Crystal Palace Company, which were not included in the settlement, but were placed in the name of Mr. O'Malley—as he contended, for him absolutely—as the plaintiff alleged, in trust for her. On October 8, 1856, the plaintiff separated from her husband. On that occasion a deed was executed by her and her husband and a trustee, whereby, after reciting that certain furniture and other effects were to be delivered by her husband to her, and the thirty-five Crystal Palace shares were to be transferred into the name of the trustee of the separation deed, it was (*inter alia*) covenanted by Mr. O'Malley that he would not molest his wife, and by the trustee that Mr. O'Malley should, during the separation, be indemnified against his wife's debts. The furniture and effects were to belong to Mrs. O'Malley as her separate property, and the Crystal Palace shares were to be held by the trustee of the separation deed, for her separate use; and in other respects the deed confirmed the marriage settlement. The thirty-five Crystal Palace shares were soon afterwards transferred by Mr. O'Malley to the trustee of the separation deed. In 1857 the plaintiff requested the trustees of the settlement to sell out, and they accordingly sold some of the settlement funds, and reinvested the produce in 1,100*l.* Great Western Railway stock, which was then transferred into the name of the trustee of the separation deed. In 1860 the plaintiff and her husband renewed their cohabitation for a short time; discontinued it till some time in 1861, when they again renewed it, with the like speedy determination. During the periods of the separations the trustee of the separation deed had paid the income of the 1,100*l.* railway stock and of the Crystal Palace shares to the plaintiff; but in 1863, in consequence of another brief reconciliation of the parties, and the peculiar relation in which their conduct had placed both themselves and him, he refused to continue the payments under the separation deed without the direction of the Court. The plaintiff accordingly filed the bill in this suit, to obtain a transfer and payment to her of the 1,100*l.* Great Western Railway stock, and the dividends thereon, and also of the Crystal Palace shares.

Mr. Dickinson and *Mr. G. Osborne Morgan* were for the plaintiff.

Mr. E. K. Karslake and *Mr. Crossley*, for Mr. O'Malley, argued that the re-cohabitation had annulled the separation deed. He was now liable, and had in fact been sued, for his wife's debts. The consideration for the separation deed, and for the transfer by Mr. O'Malley to the trustee of it of the Crystal Palace shares, having therefore failed, Mr. O'Malley's marital right to them revived. He did not claim the 1,100*l.* railway stock, but asked that his rights under the settlement should be carefully guarded.

Mr. Greene and *Mr. G. O. Edwards* were for the representatives of the trustee of the separation deed.

Mr. Bagshawe and *Mr. W. Barber* were for the trustees of the plaintiff's marriage settlement.

Stuart, V.C., said the right of the plaintiff to the 1,100*l.* railway stock under the settlement was undoubted, as also was that of her husband to his annuity of 50*l.* and to his other contingent interests in the settled property. But as to the thirty-five Crystal Palace shares, as the re-cohabitation had annulled the separation, and as Mr. O'Malley was now clearly liable for his wife's debts, the chief consideration for the deed had failed. It was not clear that, in the absence of the trustee's covenant to indemnify Mr. O'Malley against his wife's debts, he would have parted with the Crystal Palace shares which had stood in his name. Under all the circumstances of the case, the trusts of the separation deed could not now be held to bind the Crystal Palace shares as against Mr. O'Malley's marital right to them. They were, therefore, his property, and the plaintiff must concur in all proper acts to revest them in her husband. The 1,100*l.* Great Western Railway stock should be sold, the costs of all parties paid out of

the produce of the sale, and those of the trustee of the separation deed must be taxed and paid as between solicitor and client.

STUART, V.C. May 24, 27. } *Re* THE LONDON, CHATHAM, AND DOVER RAILWAY CO.'S ARRANGEMENT ACT, 1867. *Ex parte* HARTRIDGE AND OTHERS.

The London, Chatham, and Dover Railway Company's Arrangement Act, 1867—Directors—Private Bill—Injunction.

This matter came on upon a summons, taken out by W. Hartridge and G. Alexander—who were appointed, by an order dated August 5, 1868, to represent the stockholders and shareholders of the general undertakings of the above-named company—for an order that they might, as such representatives, oppose the passing of a bill now before Parliament, entitled 'An Act to confer additional powers on the London, Chatham, and Dover Railway Company, for the construction of their works, and otherwise in relation to their own undertakings, and the undertakings of other companies, and for other purposes;' or that Mr. G. Hodgkinson and the other directors (who were named in the summons) of the company might be restrained from further prosecuting or promoting the bill in Parliament in the name of the company, and from using the seal of the company in introducing, prosecuting, or promoting any other bill in Parliament affecting the rights and interests of the stockholders and shareholders in the general undertakings of the company, without the previous sanction of the Court; that the costs of this application and of opposing the bill, and incident thereto, might be costs in this matter; and that payment thereof might be reserved.

The bill in question was a private one. It had passed the House of Commons, and had been read a first time in the House of Lords; and among the principal of its provisions for finally settling the affairs of the company was one for the submission of them to the arbitration of Lord Salisbury and Lord Cairns.

Mr. Dickinson and *Mr. T. A. Roberts* supported the application, and contended that these directors, appointed under the Arrangement Act of 1867, were trustees of the property of the company for the special purposes of that Act; that those persons whom Mr. Hartridge and the other applicants represented were the *cestui que trust* of those trustees; that those trustees were applying the funds of the company in support of this bill, which was one not consistent with the title of it, and directly at variance with the Arrangement Act; and that it would, if passed into an Act, have the effect of overruling all that this Court had hitherto done towards settling the rights of the various parties interested in the company's property.

Sir R. Palmer and *Mr. Kekewich*, for the directors, opposed the application, and insisted that it could only be made under section 33 of the Arrangement Act, but that that section contained no words authorising it. These directors stood in a very special relation to the company; and, so far from the bill in question being one which they ought not to prosecute, it was in truth, and the House of Commons had so determined, the best means of effectually arranging the very complicated affairs of this great company. They also said that the applicants were too late in coming now to the Court for the injunction which they sought.

STUART, V.C., after commenting on the conduct of the directors and the solicitors in the matter, and stating that the Court had undoubted jurisdiction to grant such an injunction as was now asked, made an order to restrain the persons named in the summons from further promoting the bill before Parliament, and from using the seal of the company for any such or the like purpose; but as other persons might apply to Parliament for leave to promote the bill, there must also be an order that the applicants should have leave to appear and oppose any further proceedings on the bill.

STUART, V.C. April 21, 23, 24. May 28. } COOPER *v.* GORDON.

Protestant Dissenters—Minister or Pastor—Nature of his Office—Right of the Majority of the Congregation to Dismiss Him.

The plaintiffs in this suit were all the trustees (but one, Mr. Christie) of a congregation of Protestant Dissenters, called Independents or Congregationalists, at Reading; and the defendants were Mr. Gordon, a minister or pastor of the congregation, the other trustee of it, and a Mr. Pike. The object of the suit was to obtain a declaration that Mr. Gordon had been duly dismissed from his office of co-pastor by a resolution of the congregation on September 8, 1868; and for an injunction to restrain him from officiating or preaching in the chapel of the congregation, from receiving the pew rents, and from otherwise interfering with the property of the congregation. It appeared that the society or congregation was endowed, by deeds dated respectively in 1707, 1708, 1808, and 1855, whereby certain property was vested in the trustees for the use of the congregation. Part of the property consisted of a house. The minister or pastor of the congregation was to be allowed to occupy that house; and if he did not, the rents of it were to be paid to him so long as he continued the pastor of the congregation. None of the deeds or rules of the society contained any provisions as to the dismissal of a pastor or minister, except for the causes of immorality or heterodoxy. In 1865 Mr. Gordon was offered, and he accepted, the office of co-pastor of the society, to act jointly with the Rev. Mr. Legg. Differences, however, subsequently arose between Mr. Gordon and his co-pastor and the congregation. The pew rents fell off, and a schism took place in the society. The deacons of it then requested Mr. Gordon to retire from his office. He refused, and the deacons themselves then resigned. A meeting of the congregation was convened; notice thereof was given to Mr. Gordon. The meeting was held on September 8, 1868, and a resolution was passed at it, by a majority of 115 votes of the members of the church then present, that Mr. Gordon should be dismissed from his office. He was informed of that resolution, after which he convened meetings of those of the congregation who were favourable to him, and succeeded in getting large majorities of them to vote for his continuing their pastor. He afterwards appointed Mr. Pike to collect the pew rents for him.

This suit was then instituted for the purposes above stated.

The defendant, the trustee, took no part in the discussion of the case.

Mr. Hardy and *Mr. J. N. Higgins*, for the plaintiffs, contended that in the absence of any express provisions in the deeds or rules of this endowed society with refer-

ence to the removal of their pastors, resort must be had to the usage of such congregations. By that, it was invariably the custom for a majority of the members of the congregation to regulate all its affairs, and especially the removal or dismissal of their ministers. Were it not so, a congregation might be saddled with a pastor whose ministrations might be most unacceptable; divisions in the society must ensue, and the disruption of the congregation would almost certainly be the result.

Mr. Greene and *Mr. Yate Lee*, for Mr. Gordon, argued that, as nothing was said in the deeds of the society, or in its rules, as to the removal of a pastor, and as no intimation was given to Mr. Gordon, when he accepted the office, as to the duration of it, he was entitled to hold it for his life. It was true that he might be removed for immorality, or teaching doctrines contrary to the tenets of the congregation; but nothing of that sort was imputed to him. Moreover, he was a member of the congregation, a *cestui que trust* of its property under the deeds, and, as a minister, beneficially interested in the rent of the house. These facts constituted additional reasons for saying he was entitled, in the absence of misconduct, to hold the office for life.

Mr. G. Whitbread was for Mr. Christie.

Mr. Hardy, in reply, urged that at law a minister of a society such as this was a mere tenant at will to the trustees of the body, by whom, or by the majority of whom or of the body, a minister was clearly removable. If it was otherwise, the very existence of such societies would be utterly impossible.

STUART, V.C., was of opinion that, in the absence of any express direction upon the subject, but having regard to the trusts of the property of this society, the right to dismiss their pastor rested with the majority of the congregation duly convened for the purpose. The resolution of September 8, 1868, was a valid one. Mr. Gordon must be declared duly dismissed as from that time, and must be restrained by the injunction of this Court, as prayed by the bill. The plaintiffs' costs must be paid by Mr. Gordon and Mr. Pike; but Mr. Christie must pay only his own.

MALINS, V.C. May 25. } HILL *v.* ROYDS.

Bill of Exchange, Amount of, Paid into Bank—Suit by Drawer against Bankers as for Money had and received on Trust—Privity.

In April, 1867, R. Kershaw accepted a bill of exchange for 738*l.* 17*s.* 6*d.*, drawn by the plaintiffs, and payable at the London and Westminster Bank. The bill was to fall due on August 8, four months after date. On August 7, Kershaw paid into the defendants' bank (Clement Royds & Co. of Rochdale) the sum of 745*l.* 13*s.* 6*d.*, at the same time leaving with them an advice note of the bill; whereupon Messrs. Royds duly advised their agents, the London and Westminster Bank, to take up the bill when presented for payment. The next morning, about nine o'clock, Kershaw died suddenly, being at the time largely indebted to the defendants on his general account. Immediately upon hearing of his death they telegraphed to London to stop payment of the bill, and on August 11 the bill was returned dishonoured to the plaintiffs. They now filed their bill for a declaration that the defendants, Messrs. Royds & Co., received the above sum in trust to apply the same in payment of the said bill of exchange, and were liable to make good to the plaintiffs the whole amount, with interest and all costs and damages occasioned by the bill having been dishonoured.

Mr. Osborne and *Mr. Locock Webb* for the plaintiffs.

Mr. Glasse and *Mr. North* for Messrs. Royds & Co.

Mr. Dixon for the representative of Kershaw.

MALINS, V.C., held that the plaintiffs had fully established their case on the merits; but technically the suit was not sustainable, there being no privity between the plaintiffs, as drawers of the bill, and the bank. The case of *Moore* v. *Bushell*, 27 Law J. Rep. (N.S.) Exch. 3, was conclusive upon the point, and the bill must be dismissed.

June 1.—The case was again spoken to on the question of costs.

His HONOUR ordered the bill to stand dismissed without costs as against the bank. The costs of Kershaw's administratrix to be paid out of his estate.

MALINS, V.C. May 26. } LEWIS *v.* MATTHEWS.

Legacy to Executor virtute officii—Death before Probate—Power of Attorney—Parties served with Notice of Decree—Costs.

Further consideration. James Lewis, the testator in the cause, who died in 1859, bequeathed a legacy of 210*l.* to his executor, William Lewis, 'for the trouble he might have in the execution of his will.' Before the testator's death William Lewis went to Australia, and thence he sent home a power of attorney to Alfred Lewis, the plaintiff, to take out letters of administration of the testator's estate with the will annexed. In 1862 William Lewis died. His representative now claimed the legacy out of the testator's estate. The plaintiff objected, on the ground that William Lewis had done nothing in the office of executor to qualify him to receive the legacy; and that he (the plaintiff) did not, in fact, act under the power of attorney, having previously taken out administration in his own person.

Mr. J. Pearson and *Mr. Ellis* for the plaintiff.

Mr. G. Hastings for children in the same interest.

Mr. Glasse and *Mr. W. Pearson* for the representative of William Lewis.

The VICE-CHANCELLOR said that, undoubtedly where a legacy was given to an executor in respect of his office, there must be evidence of his intention to act, and such evidence was best supplied by taking out probate of the will. But this was not absolutely necessary, for an executor might, if he chose, act under the will before probate, and in that case (subject of course to the risk of the will being set aside), he would have his legacy (*Harrison* v. *Rowley*, 4 Ves. 212). In the present case, the plaintiff in his bill admitted that he took the testator's estate as attorney for William Lewis, and received moneys as his agent; he could not now be heard to the contrary. Although William Lewis had never taken out probate, there was sufficient manifestation of intention to entitle his representative to be paid the legacy. On the question of costs, it appeared that the several children represented by *Mr. Hastings* had, by leave, attended all proceedings in Chambers, although not parties to the record. The VICE-CHANCELLOR allowed one set of costs amongst them, following the case of *Bellew* v. *Bellew*, Weekly Notes, 1868, p. 253.

MALINS, V.C. April 24. May 29, 31. — *In re* CORK AND YOUGHAL RAILWAY Co. (CLAIM OF OVEREND, GURNEY & Co.) SAME (CLAIM OF LONDON, HAMBURGH, AND CONTINENTAL EXCHANGE BANK.

Company — Exhaustion of Borrowing Powers — Lloyd's Bonds — Money Advanced for the Purposes of the Company — Equitable Liability.

Claim against a railway company which had sold its undertaking by the assignees of certain Lloyd's bonds.

It appeared that in August, 1862, the above-named railway company issued a balance sheet showing that they had exhausted their capital and their powers of borrowing, had incurred further debt of 109,000*l.*, and had not completed their railway. Under these circumstances they summoned a special general meeting to consider the financial position. The meeting was held, and a resolution passed that, 'inasmuch as the board had received sums from one D. L. Lewis for the purposes of the company, which sums had been duly expended on such purposes, the board be authorised to issue bonds to the said Lewis.' In accordance with this resolution bonds to the eventual amount of 195,000*l.* were given to Lewis, bearing on their face a statement that they were 'for work done, &c.' By these means the railway was finished and opened for work. In 1866 an Act was passed for winding-up the affairs of and dissolving the Cork and Youghal Railway. This Act recited the amount of capital and authorised debt, and that 'the company might have other debts beyond the mortgage debts which they had not the means of paying,' and that the Southern and Western companies were prepared to purchase the undertaking, and then provided that the purchase-money should go in payment of costs, compensation to landowners, mortgages, &c., and the surplus to the shareholders, 'subject to all priorities, equities, and claims of preference shareholders, bondholders, and others to which the property of the railway would have been subject if that Act had not been passed.' The surplus in question amounted to 160,000*l.*, in respect of which claims were now made by the first-named claimants as assignees, and by the second as mortgagees of the bonds given to Mr. Lewis, to rank against the sum in Court *pari passu* with other creditors of the company. These claims were resisted by the other creditors, and by preference shareholders, on the ground that the bonds in question had been in fact only a method for raising money outside and beyond the parliamentary powers, and therefore did not constitute a valid debt against the company.

Mr. Roxburgh and *Mr. Lindley* for first claimants.

Mr. Cotton and *Mr. G. Hastings* for second claimants.

Mr. J. Pearson and *Mr. Waller* for creditors.

Mr. Jessel and *Mr. J. N. Higgins* for preference shareholders.

The VICE-CHANCELLOR pointed out that the proper course for the preference shareholders, if they objected to these bonds, would have been to have opposed them at the special meeting in 1862, and if necessary, to have filed a bill to restrain their issue by the company. Naturally they had not taken this course, as it was only by means of the bonds that their railway had been finished and their property made productive; but that being the case, they could not now contest their validity. It was true that all the capital of the company had been raised and all its borrowing powers exhausted, and the result was that at law these bonds did not constitute a debt binding the property of the company. But where it was shown that money had been borrowed by a company for the purposes and for the benefit of the company, and had been duly expended in that way, equity demanded that the lender should have a claim on the property which had been thus improved by his money. Here it was evident that the preference shareholders knew that their undertaking was being carried out and made productive by money borrowed beyond the parliamentary powers; there was an affidavit by the secretary of the company that the money advanced had been expended for the purposes of the company; and there was an admission by counsel at the bar that 'some at least of the bonds in dispute had been given for money actually advanced by Lewis and expended for the benefit of the company.' It was conceded that companies constituted under the Joint-stock Companies Acts could make themselves liable for money borrowed; but it was contended that, under a private railway Act specially limiting the borrowing powers, a company could not make itself liable beyond the extent of such powers. He could not see the distinction between the operation of the general and of the special Act. No doubt there was no power to make any call on the shareholders beyond their liability; here, however, it was not sought to establish these bonds against the shareholders personally, but against the property of the company in which the money advanced had been sunk. There must be an inquiry what amount of the money advanced on these bonds had been expended for the purposes of the company, and a declaration that such amount constituted a debt, which must be made good before any money could be taken out of Court. Costs of all parties out of the estate, but no further costs of attending proceedings in Chambers could be allowed to the shareholders.

MALINS, V.C. May 27. — ROBSON *v.* DODDS.

Practice — Taking Bill off File — Nominal Plaintiff.

Motion by defendant to take the bill off the file under the following circumstances:—

The bill was filed by Robson, a carpenter, and member of the Northern Counties Benefit Building Society, on behalf of himself and the other members of the society, against the trustees, charging them with having borrowed money and dealt with the sums borrowed in a manner inconsistent with their duties. In support of the motion affidavits were filed showing that Robson was the husband of the laundress of a Mr. Harle; that Harle had been solicitor to another benefit society, with which some of the defendants were also connected; that dissensions arose between Harle and the other benefit society, in consequence of which, on January 20 last, Harle was dismissed from the post of solicitor to that society; that five days after that date the plaintiff Robson became possessed of an interest in the defendants' society to the amount of 2*l.* 0*s.* 3*d.*, upon which interest the present bill was filed; that this suit was in fact the suit of Harle, and instituted simply for the purpose of revenge against such of the defendants as had caused his dismissal from the other society. No affidavit was filed in contradiction.

Mr. Cole (*Mr. A. G. Marten* with him) now moved that the bill be taken off the file on the ground that, while purporting to be Robson's, it was in fact Harle's.

Mr. Glasse (*Mr. G. Hastings* with him), for the

plaintiff, referred to the judgment of Lord CAIRNS in *Seaton* v. *Grant*, Law J. Rep. Chanc. 36, 638, setting out the four grounds on which proceedings could be stayed in this summary manner: (1) where plaintiff is required to give security for costs; (2) where defendant submits to give all the relief asked; (3) where the subject matter of the suit has perished; (4) where the bill has been filed without the apparent plaintiff's authority. None of these grounds existed in the present case. As to the smallness of the plaintiff's interest, that was a matter for the hearing, and not for an interlocutory proceeding. In *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway*, 9 W. R. 818.

The VICE-CHANCELLOR said that where, as in *Seaton* v. *Grant*, the bill was the plaintiff's own bill, and he was responsible for the costs, however improper his motives, he must be allowed to carry it to a hearing; nor would the poverty of a plaintiff give a defendant a right to stop a suit in this manner. But in the present case it had been sworn that the bill was not Robson's, but Harle's, and he must infer, from the facts brought before him, that Harle had supplied the money and indemnified Robson against costs; at any rate, he clearly ought to do so. The rule laid down in *Seaton* v. *Grant* only applied where there was a genuine and responsible plaintiff. Here there was neither; and, as in the case cited of *Forrest* v. *Manchester, &c., Railway*, the proceeding was a mockery and an illusion. He was satisfied that in that case Lord WESTBURY would, if applied to by motion, have allowed the bill to be taken off the file. He considered that, where there were inherent vices in a bill which would ensure its dismissal at the hearing, but afforded no grounds for demurrer or plea, the proper course was to move that the bill be taken off the file; he should, therefore, accede to the motion, with costs against the plaintiff.*

JAMES, V.C. May 29. } *Re* BULMER'S TRUSTS.

Testamentary Appointment—Appointee Predeceasing Appointor—Accruer.

Elizabeth Bulmer having a power (not exclusive) to appoint a fund among nine children then living, appointed by will to all such children in equal shares, to become vested and transmissible, and payable at such ages and times, and in such manner and with such benefit of survivorship as was directed in default of appointment by the instrument creating the power (*i. e.* in equal shares, to vest on their respectively attaining twenty-one, or if daughters, marrying, with accruer), except that the shares of three of them, who were daughters, should be for their separate use. By a codicil she directed that the share of any child who should die without leaving issue should go and be equally divided amongst the other children, to the exclusion of any widow or husband whom any of her said children might happen to leave him or her surviving. One of the children, William John James, died in the lifetime of the testatrix (but after the date of the codicil), leaving issue. After the death of the testatrix one-ninth of the fund was, with the consent of all parties, settled upon such issue. Subsequently, however, Mrs. Hewetson, another of the children, died, having been married, but leaving no issue; and the issue of William John James claimed a share of her share also under the codicil aforesaid. The fund having been paid into Court, the surviving children of the testatrix petitioned to have it divided among them, to the exclusion of the issue of the deceased child.

Mr. Kay and *Mr. C. T. Simpson*, for the petitioners, argued that both the will and the codicil must be taken as speaking from the death of the testatrix, and as referring to the only persons to whom she could then have appointed, namely, the children then living; consequently that the respondents had no right even to the original share which had been given up to them, much less to the accrued share which they now claimed.

Mr. Amphlett and *Mr. Crossley*, for the children of John James, contended that the clear intention of the will, consequently of the codicil also, was that the fund should go to the same persons as would take in default of appointment, and that the general rule as to wills, speaking from the death of the testator, would not necessarily apply to a testamentary appointment of this kind, so as to render it void.

JAMES, V.C., thought that if the case had stood only upon the will, he should have said that the meaning of the testatrix was not to interfere with the settlement in default of appointment further than by limiting the daughters' shares to their separate use. But the codicil was really an attempt to execute the power, in construing which she must be taken to have known that she could not legally appoint to a deceased child; and such an intention ought not to be attributed to her for the mere purpose of making it fail. The order would therefore be as prayed, except that the respondents would not have to pay any costs.

* In the course of the case Mr. Bristowe, as *amicus curiæ*, referred to *Bloxam* v. *Metropolitan Railway*, Law J. Rep. 2 Chanc. 337, in confirmation of the principle laid down by the Vice-Chancellor.

Courts of Common Law.

Queen's Bench. May 28. } BUCH *v.* THE VESTRY OF THE PARISH OF SAINT MARYLEBONE.

Compensation—Notice to Treat—Mandamus—Failure to Deliver Particulars of Interest in Property Taken—Public Body.

Mandamus stating that after the passing of 57 Geo. III. c. 29, 'An Act for better paving, improving, and regulating the streets of the metropolis,' &c., and after the Metropolis Local Management Act, 18 & 19 Vict. c. 120, the plaintiff was lessee of premises in the parish of St. Marylebone, and that the defendants, in exercise of the powers conferred upon them by the Acts, gave the plaintiff notice that they required to take these premises,

and that they were willing to treat for the purchase of them and for the compensation to be made to the plaintiff; and that they required the plaintiff to deliver within twenty-one days particulars of his interest in the premises. The mandamus alleged that the plaintiff furnished these particulars, but that the vestry neglected to issue their warrant to the Sheriff of Middlesex to assess the compensation due to the plaintiff, and claimed damages and a peremptory writ to enforce obedience. Fourth plea, that the plaintiff did not, within twenty-one days from the service of the notice to treat, furnish the particulars required. Fifth plea, that the plaintiff did not within twenty-one days, or within a reasonable time, furnish these particulars.

Demurrer and joinder in demurrer.

The Act 57 Geo. III. c. 29, 'An Act for better paving, improving, and regulating the streets of the metropolis,' enables the commissioners or trustees appointed to execute the powers of the Act, to widen streets, and for this purpose to purchase and demolish houses. By section 82, if any person interested in any such house, &c., cannot agree with the Commissioners as to the sale of his premises, they are required to issue a warrant to the sheriff to summon a jury to assess the compensation. By 18 & 19 Vict. c. 120, these powers are vested in vestries and district boards.

H. Payne (*Quain* with him) in support of the demurrer.

Keane (*Bridgman* with him), in support of the pleas, argued first that the plaintiff must show that the vestry had a continuing necessity for the land in question from the time when they first gave the notice to treat; secondly, that the Board were a public body, and could not be dealt with in the same manner as a private corporation like a railway company.

The COURT (COCKBURN, C.J., BLACKBURN, J., MELLOR, J., and LUSH, J.) held that the pleas were bad. *Rex* v. *The Commissioners for Improving Market Street, Manchester*, 4 B. & Ad. 333 (note), was a conclusive authority to show that the vestry, having given a notice to treat, could not withdraw from it; and the failure on the part of the occupier to furnish particulars was no answer to the claim, as no such particulars were required by the local Act. With regard to the second point, it was disposed of by *Coe* v. *Wise*, 37 Law J. Rep. Q. B. 262.

Judgment for the prosecutor.

Queen's Bench.
Jan. 13,
May 31.
} WEST *v.* DOBB.

Landlord and Tenant—Covenants running with Land—Assigns not mentioned in Covenant—Covenant not to Assign—Equitable Assignment of Term.

This was an ejectment to recover possession of two farms of which the plaintiff was lessor, for breach of a covenant not to assign. The farms were let in 1860 to two persons named Teddar and Pridham for a term of fourteen years, the lease containing a covenant by the lessees for themselves, their executors, and administrators, that they, their executors and administrators, should not nor would 'underlet, assign, or otherwise part with the possession of the demised premises or any part thereof, without the written consent of the lessor, his heirs and assigns, being first had and obtained for that purpose,' with a power of re-entry on default. Teddar and Pridham occupied the farms for about three years, and then sold their interest in them to a Mr. Wade, the lessor writing a letter in which he consented to Wade taking 'the two estates that Teddar and Pridham have been renting of me, on the same conditions and in accordance with their lease.' The letter concluded with the words, 'This will be a sufficient authority for Messrs. Teddar and Pridham to transfer the lease to you.' Wade entered and took possession of the farms, but no assignment of the term was executed to him. In 1867 he executed a deed, assigning his property, including the farm, to trustees for the benefit of his creditors, the lessor giving his consent in the same terms as formerly. The trustees then agreed to sell the premises to the defendant, who entered upon them, whereupon the plaintiff brought ejectment. At the trial before BLACKBURN, J., at Bodmin, the learned judge nonsuited the plaintiff, with leave for him to move. A rule having been obtained,

Pinder showed cause, and contended that as Wade and his trustees were only equitable assignees of the premises, nothing done by them could work a forfeiture as regarded the original lessees, Teddar and Pridham; secondly, that as assigns were not mentioned in the covenant, the trustees would not be bound by it.

Kingdon and *A. Charles* supported the rule, and further contended that the terms of the lessor's letter authorising a transfer of the lease would only justify a proper legal transfer by deed, which had not been made.

The COURT (COCKBURN, C.J., BLACKBURN, J., and MELLOR, J.), after taking time to consider, now delivered judgment in favour of the defendant, and discharged the rule. It was unnecessary to consider whether the fact that assigns were not mentioned in the covenant prevented it from running with the land, as the Court were of opinion that there had never been any assignee of the whole term within the meaning of the covenant, and consequently that there was no forfeiture. With regard to the objection on the terms of the letter, they did not think that the permission was restricted in the manner contended for.

Rule discharged.

Common Pleas.
May 29, 31.
} WOOLLEY *v.* THE NORTH-LONDON RAILWAY COMPANY.

Production and Inspection of Documents—Common Law Procedure Acts, 1852, 1854.

Meadows White showed cause against a rule *nisi* to inspect certain documents mentioned in an affidavit of discovery of documents made by the secretary of the defendants' railway company.

W. G. Harrison argued in support of the rule.

The action was by a railway passenger for an injury from the defendants' negligence, and the negligence was imputed to the defective construction of one of the defendants' engines. The documents described as Nos. 1, 2, and 3 were reports to the defendants' general manager as to the accident—No. 1 being by one of the defendants' inspectors, No. 2 by the guard of the train, and No. 3 by the defendants' locomotive superintendent; and the documents described as Nos. 5 and 7 were reports after action brought from scientific men, consulted by or on behalf of the defendants, with reference to the cause of the accident.

The COURT decided that reports made in the ordinary discharge of duty by one officer of the defendants' com-

pany to another without reference to any litigation are not privileged from discovery under the Common Law Procedure Acts, whether such reports were made either *ante* or *post litem motam*, or whether they contained only matters of fact or matters of opinion, but that information obtained confidentially with a view to litigation, viz. of instructing the person obtaining it, whether he has ground for making or resisting a claim, is privileged. On these grounds inspection was granted of the documents Nos. 1, 2, and 3, and refused of documents Nos. 5 and 7.

Rule accordingly.

Common Pleas. June 1. } CRACKNELL *v.* THE MAYOR, &c., OF THETFORD.

Navigation Act—Dredging River—Weeds and Accumulation—Injury to adjacent Land from Overflowing.

Special case raising the question whether the plaintiff was entitled to recover by action against the defendants (as having the control of the River Brandon or Lesser Ouse, and for improving the navigation of which they were made the undertakers by a local statute) compensation for an injury the plaintiff had sustained by his land being overflowed. The overflowing was found to have arisen from weeds not having been effectually cut, and from accumulations of silts by reason of staunches the defendants had put in the river, which accumulations had not been removed by dredging.

Keane (*Bulwer* and *Merewether* with him) argued for the plaintiff.

O'Malley (*Edward L. O'Malley* with him) appeared for the defendants, but was not called on.

The COURT were of opinion that, as the statute had not vested the soil of the river in the defendants, or given them a right to interfere with the river otherwise than for navigation; and as it did not appear, from anything stated in the case, that the staunches were put negligently or maintained otherwise than for navigation, or that the removal of the weeds or accumulation was necessary for the navigation, the plaintiff had failed to show any duty which the defendants had omitted to perform, or any wrongful act for which they were liable in this action.

A nonsuit entered.

Exchequer. May 22, 24. } CHAPMAN *v.* JONES.

Prescription—Private Chapel in Parish Church.

Declaration in trespass for breaking and entering a 'chapel aisle or private or lesser chancel' in Mottram parish church. Plea 'not possessed.'

It appeared at the trial at Chester that the Earl of Stamford, whose predecessors had from time immemorial repaired Mottram parish church, granted to the plaintiff in 1858 the chapel in question, which was situated at the south-east corner of the church, forming to the eye part of one and the same building with it. The defendant, the vicar of the parish, had removed the lock from a door by which the chapel was entered from the churchyard. Acts of ownership by Lord Stamford's predecessors were proved to show that they had been seised in fee of the ground on which the chapel was built, and were the owners of it up to 1858, when the grant was made to the plaintiff.

KELLY, C.B., having directed a verdict to be entered for the plaintiff, a rule was afterwards obtained to enter a nonsuit, on the ground that there was no evidence that the plaintiff had an exclusive right to the door as against the defendant, and that the chapel was part of the parish church; also that the plaintiff had no legal right to the chapel, inasmuch as the manor and manor-house to which it was appurtenant were still the property of the Earl of Stamford.

A. J. Stephens, *McIntyre*, and *Benjamin Shaw* showed cause.

Hardinge Gifford and *Horatio Lloyd* supported the rule.

The COURT discharged the rule, holding that the Earl of Stamford's predecessors had a freehold of inheritance in the soil of the chapel, and that the chapel was the plaintiff's, although the manor and manor-house were still the Earl of Stamford's.

Rule discharged.

Exchequer. May 31. } GODWIN AND ANOTHER *v.* STOUT AND ANOTHER.

Debtor and Creditor—Deed of Arrangement—Omission to Plead the Deed—Estoppel—Duty of Sheriff to Arrest.

Demurrer to replication.

The action was against the Sheriff of Middlesex for not arresting one Petley upon a *ca. sa.* The defendants pleaded that, after the accruing of the plaintiffs' claim against Petley, and before the delivery of the writ to the defendants for execution, Petley executed a deed of arrangement with his creditors under the Bankruptcy Act, 1861, s. 192, and obtained a certificate of registration, whereof defendants had notice.

Replication that the deed contained a release, and was (if valid) pleadable in bar of the action in which the judgment was obtained, but that judgment was signed for want of a plea; that the required number of creditors had not signed; and that Petley did not claim protection under the deed; of all which defendants had notice. Demurrer.

Quain (*Day* with him), for the defendants, argued that the sheriff, if he had taken Petley, would have been bound to release him under *Ames* v. *Colnaghi*, 37 Law J. Rep. (N.S.) C. P. 159, and therefore it was useless to go through the formality of arresting. As to Petley's not having claimed protection, he had not had an opportunity of doing so because he had not been arrested. He attempted to show that *Rossi* v. *Bailey*, 37 Law J. Rep. Q. B. 204, which decided that a debtor who omitted to plead a deed was estopped from afterwards setting it up as a defence to an execution, ought not to be followed in this case, because, although the sheriff might know the date of the judgment from the writ, and the date of the registration of the deed from the certificate, yet he could not tell if the deed did or did not contain a release so as to be pleadable in bar.

Morgan Lloyd was to have argued for the plaintiffs.

The COURT (KELLY, C.B., BRAMWELL, B., CHANNELL, B., and CLEASBY, B.) gave judgment for the plaintiffs, on the ground that Petley had not pleaded the deed. They considered that they were concluded by the decisions of the Court of Queen's Bench in *Wigram* v. *Bailey*, 37 Law J. Rep. Q. B. 71, and *Rossi* v. *Bailey*, which cases were not precisely in point, but were decided upon a principle which applied to this case.

Judgment for the plaintiffs.

Exchequer. May 28. } HOLMES *v.* THE NORTH-EASTERN RAILWAY COMPANY.

Negligence—Repair of Coal Depot.

Action for negligence tried before CLEASBY, B., at the last assizes at York. Verdict for the plaintiff—damages 75*l.*, the defendants having leave to move to enter a nonsuit on the ground that there was no evidence of negligence.

The defendants had a coal depot at York, with certain cells under the railway, and the practice was for the persons who went there to receive their coals to back a cart into one of the cells, and then to tip a coal truck over the cell and so send the coal down into the cart below; and it had become the practice for such persons to go upon the railway and assist the company's servants in tipping the waggons. The plaintiff went to the station to receive some coals, and asked the station-master for a cell, but was told that they were all full, and that he could not have one that day. He replied that he had urgent need of the coals, and would go up to the truck and get some. He went up to and along the flagway which ran by the side of the truck, and mounting on to the buffer of the truck, threw some coals down into his waggon. As he stepped off, the flagway gave way under his foot, and he was thrown down and injured. The flagway was out of repair.

D. Seymour and *Bohn* showed cause against a rule which had been obtained to enter a nonsuit.

Overend and *Kemplay* supported the rule, contending that the plaintiff was on the flagway of his own accord and not by the invitation of the company, although with their permission, and that he went there at his own peril.

The COURT (KELLY, C.B., BRAMWELL, B., CHANNELL, B., and CLEASBY, B.) discharged the rule, holding that persons coming to the depot for coal had been invited to come upon the flagway for the purpose of getting it, and that the plaintiff's going up and throwing down the coal, instead of tipping a truck over as was usual, was merely a variation of the mode of getting the coal, and did not interfere with the plaintiff's right to have the flagway kept in a safe state.

Rule discharged.

Exchequer. May 31. } CASE (APPELLANT) *v.* STORY (RESPONDENT).

Metropolitan Hackney Carriage—Railway Station.

Case stated by a Metropolitan police magistrate, under 20 & 21 Vict. c. 43.

The appellant obtained a summons under the Hackney Carriage Act, 1 & 2 Wm. IV. c. 22, s. 26, against the respondent, the driver of a hackney carriage, for that he in a certain public place, to wit the Great Northern Railway Station, at King's Cross, within the Metropolitan Police District, refused to drive the said carriage to a certain place, not exceeding six miles in distance, to which he was required to drive the appellant.

It was proved that during the cab strike the appellant, who was a member of the Cab Strike Committee, went into the Great Northern Railway Station, and seeing the respondent with other privileged cabmen (as they were popularly called) on the arrival platform waiting for a train, required him to drive to Camden Town. This was done for the purpose of raising the question whether the railway station was a proper cab-stand. The respondent finding that the appellant had not arrived by the train, refused to drive him. The station is not a place appointed by the Commissioners of Police as a cab stand, and it is the private property of the company.

The appellant maintained that the respondent had made himself liable to a penalty under 1 & 2 Wm. IV. c. 22, ss. 35, 42, and 16 & 17 Vict. c. 33, s. 17, or one of those Acts.

The magistrate decided that the station was not a public place at which the respondent was plying, within the meaning of the Hackney Carriage Acts, and that therefore he was not governed by the rules laid down by those Acts, and he dismissed the summons. The question for the Court was whether he was justified in so doing.

G. Denman (*Hancock* and *Hume Williams* with him) was heard for the appellant.

J. Brown (*Wills* with him) was for the respondent, but was not called on.

The COURT (KELLY, C.B., BRAMWELL, B., CHANNELL, B., and CLEASBY, B.) gave judgment for the respondent.

Court of Criminal Appeal.

Coram COCKBURN, C.J., BRAMWELL, B., MELLOR, J., SMITH, J., and HANNEN, J.

Crown Cases Reserved. May 29. } REGINA *v.* HENRY DERING.

Larceny by a Servant—Animus Furandi—Question for the Jury.

Case reserved by the chairman of Kent Quarter Sessions.

The prisoner was tried at the Adjourned Quarter Sessions for the county of Kent, held on March 4, 1869, on an indictment for stealing 6*s.*, the moneys of Henry Simmons, his master.

The following facts must be taken to have been proved:—

The prisoner was a waggoner in the employment of the prosecutor. On February 13 last the prosecutor's bailiff sent out four teams of horses with waggons, one of them being in charge of the prisoner.

The prisoner and the other persons in charge were

ordered to go with the teams to a place called Snodland to fetch coal.

For the journey which these teams were to take they should have gone through two turnpike gates called the Royal Oak and Snodland Gate, and before starting the said bailiff delivered to the prisoner money to the amount of 8*s.* 8*d.* for the purpose of paying the tolls at the said gates in respect of all the teams.

On February 25 last the bailiff asked the prisoner if he had paid the tolls at the Snodland Gate. The prisoner said he had not. The said bailiff asked him why he had not paid the said tolls, and the prisoner replied that by the road they went no toll was payable, and that he had spent the money, amounting to 6*s.*, on beer for himself and the other waggoners and mates. The prisoner stated the teams had gone by a parish road, which only crossed the turnpike road at the gate, and thus no toll was payable.

The jury convicted the prisoner, but having some doubt whether these facts prove a larceny on the part of the prisoner, the Court reserved the point for the opinion of the Court for the consideration of Crown Cases Reserved, and admitted the prisoner to bail to appear and receive judgment when called upon.

The question for the consideration of the Court is, whether under the above facts the prisoner could properly be convicted of larceny.

No counsel appeared for the prisoner.

Barrow for the prosecution. The prisoner took the money from the bailiff with a specific direction as to its application. He had the bare custody of the money for that purpose. His possession was the possession of his master, whose money it was until he converted it to his own use by spending it on beer, when he was guilty of the trespass which constituted the larceny (2 Russ. on Crimes, 382, 4th ed.). The distinction in cases of this kind is, that if the owner part with the custody only, and not with the possession, and the prisoner convert the chattel to his own use, though he had no felonious intent at the time he received it, it is larceny; but if the owner part with the possession, so as to give the servant the power of dealing with it, and he convert it to his own use, it is then only larceny, if there was a fraudulent intent at the time the prisoner took it (2 Russ. on Crimes, 393, 4th ed.). The cases of *Reg.* v. *Beaman*, C. & M. 595, and *Reg.* v. *Goode*, C. & M. 582, are especially in point.

Cockburn, C.J.—The doubt I feel is whether, upon the facts of the case before us, there was any intention to commit larceny; and I do not gather from the statement of the case that that question was distinctly left to the jury. If the man said to himself, 'By going the other road I equally well do what my master intends, and save the toll, and it is the same thing to master whether I spend it on the tolls or save it and take it out in drink with my mates;' and the question had been left to the jury whether, upon that state of the man's mind, they thought it showed a 'thievish mind,' as my brother Bramwell puts it—that is to say, a felonious intention—I should say that they would not have so found. I cannot see that that question has been left to them. I think that it was a wrong thing for the servant to do; and when it was brought to the knowledge of the master, he would have done right in giving him a 'rowing,' and if it occurred a second time he might properly have discharged him; but I do not think it is a proper case for a prosecution for felony.

Bramwell, B.—Suppose a feed given to a servant for his master's horses, and the man got a friend of his to give the horses their feed, and the man disposes of the feed in another way, is that larceny?

Hannen, J.—Or if bread were given to the servant to feed the horses, and they would not eat it, and the man eat it himself, is that larceny?

Barrow.—Perhaps not. Because there could not be a felonious intention; but here the man says nothing about it for twelve days, and not then till he is asked about it.

Cockburn, C.J.—Then he tells the truth. He says he misapplied the money, but in effect that he thought he had a right to do so under the circumstances.

Per Curiam.—We do not collect from the statement of the case that the proper question was distinctly put to the jury, and therefore, without saying that under no circumstances the prisoner could not be found guilty under the above facts, we think that on the special facts of this case the conviction should be quashed.

Conviction quashed.

Note.—We give a note of the above case, as we think it may be useful as a guide to justices as to the proper mode of dealing with similar cases; but we do not intend to include it in the cases reported in the Law Journal Reports, because the Court seemed anxious to have it clearly understood that they did not decide that under the above facts the prisoner could not be convicted of larceny or determine any other matter of law, but merely that, upon the statement of the case, they rather inferred that the opinion of the jury upon the question of the existence of felonious intention had not been separately and distinctly asked and given, and therefore the conviction would be quashed. But, probably, had the Court felt called upon to decide the point of law as to the legality of the conviction, the felonious intent being found to exist, they would have concurred with the authorities cited by the counsel for the prosecution, and have upheld the conviction.

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May 28.

Mortgagee in Possession, Sale by—Misstatement in Particulars—Form of Decree.

This was an appeal by the defendant from an order of Stuart, V.C., reported *ante*, p. 66, granting the usual account against him as mortgagee in possession, and ordering that, in taking such accounts, the chief clerk should ascertain whether the money produced by the sale of the mortgaged premises was a fair and proper price, and more or less than would have been fixed for a reserved price in case the premises had been sold under a decree of the Court; and that the defendant should be charged with so much as the chief clerk should ascertain and state that the price for which the same was sold was less than would have been fixed for such reserved price.

Mr. Dickinson and *Mr. H. M. Jackson* for the appellant.

Mr. Serjeant Sargood and *Mr. Ince* for the respondent.

The Lord Chancellor thought that there was no evidence to prove that any loss had been incurred at the sale by reason of any misstatement or neglect on the part of the vendor, the mortgagee. The Vice-Chancellor's order must therefore be varied by striking out so much of it as directed the chief clerk to ascertain and state what loss had been occasioned at the sale by the defendant's misconduct, and charged the defendant with it. There must, of course, be the usual account taken against the defendant as mortgagee in possession; but the plaintiff must pay the costs of the suit up to and including the hearing; there would be no costs of the appeal, and the deposit would be returned.

Lords Justices. } Earl Beauchamp *v.* Winn.
May 6, 29.

Warren of Conies—Right to the Soil—Rescinding Agreement—Mistake.

In 1864 the then Earl Beauchamp and the defendant Charles Winn entered into an agreement for the exchange of portions of their respective estates, the agreement being founded on the assumption that the earl was entitled to a right of free warren over certain lands called the East Common, in the parish of Brumby, and that the soil of, and materials under, the said common belonged to Winn. This agreement was executed, and possession given accordingly. In 1865 the late earl discovered a document which purported to be a grant from the duchy of Cornwall, to his predecessor in title, dated March 1799, and whereby was granted 'all that warren of conies, with all the rights, members, and appurtenances in Brumby, and all that lodge or house thereupon built, and all that warren of conies, with the rights, &c., in Redbourne, both which said warrens of conies are now commonly called or known by the name of Brumby Warren, and do extend themselves in and over the wastes or east moors of Brumby, &c.' Winn claimed also under a grant from the duchy, dated July 1799, of 'the manor and soke of Kirton Lindsey,' and alleged in the pleadings that the East Common was included within that manor and soke, and that the soil of and minerals under the East Common passed by it. The earl, on discovering the grant of March 1799, considering that he was entitled by virtue of it to the soil and minerals under the East Common, instituted this suit to set aside the agreement, on the ground of common mistake. The Master of the Rolls dismissed the bill; from this decision Earl Beauchamp appealed.

Mr. Jessel and *Mr. Walford* for the appellants.

Sir R. Palmer, Mr. Mellish, Mr. Speed, and *Mr. Jeune* for the respondent.

The judgment of the Court was delivered by

Giffard, L.J., who, after reviewing the facts of the case and the authorities, stated that he considered that by a grant of a warren a right to the soil might pass, if the intention of the instrument was to pass the soil; the question here therefore simply was, what was intended to pass by the grant of March 1799. His Lordship came to the conclusion that, looking at the words of the grant and the acts of the various parties interested in it since its date to the present time, it was never intended, nor was it considered by any single person, that by the word 'warren' the soil did in fact pass. The appeal therefore failed, and must be dismissed with costs.

Lords Justices. } *Ex parte* Rose. *In re* Rose.
May 28.

Bankruptcy—Jurisdiction of County Court—Bankrupt's Belief as to Amount of Debts—Bankruptcy Act, 1861, *s.* 94.

This was an appeal from an order of Mr. Skinner, the County Court judge at Wolverhampton, annulling an adjudication on the ground that the bankrupt had not in His Honour's opinion a *bona fide* belief that his debts amounted to less than 300*l.* at the time of filing his petition; the debts, as it appeared, in fact exceeded that amount by above 20*l.* At the time of filing the petition the petitioner had but one debt, viz., a judgment for 225*l.*, and the costs of the action in which it had been recovered. These costs had not been taxed, but the bankrupt's solicitors advised him that they could not be expected to exceed 55*l.* He therefore calculated that he owed 280*l.* on this account, and he was under a liability which he estimated at 10*l.*, making a total of 290*l.* In fact the taxed costs amounted to 85*l.*

Mr. Everitt was for the appellant, the bankrupt.

Mr. De Gex and *Mr. A. R. Jelf* for the opposing creditor.

Their Lordships thought that the bankrupt must be taken, under the circumstances, to have made a fair estimate of his debts, and that the case properly came within s. 94 of the Bankruptcy Act, 1861, and therefore the County Court was the proper Court to apply to. They discharged the order of the County Court judge, and gave liberty to the appellant to proceed with the bankruptcy, giving him protection from arrest for a month, in order that he might do this.

LORDS JUSTICES. May 29, 31. — *Ex parte* LONDON, CHATHAM, AND DOVER RAILWAY CO. *In re* LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT, 1867.

Jurisdiction—Injunction to Restrain Application to Parliament—Breach of Trust by Directors.

This was an appeal from two orders of V.C. STUART, one restraining the directors of the London, Chatham, and Dover Railway (who had been appointed under the Arrangement Act, 1867) from further prosecuting a bill now before Parliament, which had been introduced by the directors in the name of the company, for the purpose of referring the affairs of the company to two arbitrators; the other directing the directors to pay into Court a sum of about 150,000*l.* in their hands. The orders had been obtained—the first by two shareholders who had been appointed to represent, for the purposes of prosecuting certain inquiries which had been directed, the stock and shareholders of the general undertaking; the other by debenture holders. The application was made under the Arrangement Act. The ground of the first application was that the directors who had been appointed for the purposes of the Arrangement Act had no authority to make an application to Parliament in the name of the company. The second was founded upon the alleged breach of trust committed by the directors in applying sums of money in their hands, received by them from the tolls of the company, in making certain payments which it was contended ought to be made out of capital. The propriety of this turned very much upon the special provisions of the Act, which were of an unusual character.

Sir R. Palmer and *Mr. Kekewich* for the appellants.

Mr. Dickinson, *Mr. Martineau*, and *Mr. T. A. Roberts* represented the respondent.

Their LORDSHIPS held that the Court had jurisdiction, acting in *personam*, to restrain persons from proceeding with applications to Parliament; yet they differed from His HONOUR as to this being a proper case for the exercise of this jurisdiction. As to the second point, they considered that no breach of trust had been committed, and therefore there were no sufficient grounds for ordering payment of the money into Court.

Both orders of the Vice-Chancellor were discharged.

LORDS JUSTICES. June 1. — *In re* SMITH, KNIGHT & CO. GIBSON'S CASE.

Debtor and Creditor—Acceptance of New Debtor by Creditor.

This was an appeal from an order of the MASTER OF THE ROLLS, allowing Mr. Gibson's claim to be a creditor of the company for 5,150*l.* and interest.

In the year 1864 Mr. Gibson, a banker at Saffron Walden, made an agreement with Messrs. Smith & Knight that he would advance to them the sum of 5,000*l.* for the purpose of making a railway, for which they were contractors, upon the security of a deposit of shares of the railway company. Shortly afterwards Messrs. Smith & Knight sold their business, including the above contract, to the limited company now being wound up. In August, 1864, Mr. Gibson wrote to Messrs. Smith & Knight with reference to the loan (part of which had then been advanced), and said that the promissory notes to be given should be jointly and severally made by Smith and Knight, 'and not by the company, as our arrangement was with you as individuals, and we know nothing of the company in this transaction.' Accordingly, Smith and Knight gave the notes, and the advances were made to them to the extent of 5,150*l.*, which was handed over to and used by the company. Interest was paid on the notes by the company, but with the exception of an application to the company for the interest and receipt of it from them no communication between Gibson and the company took place relative to the loan. The question was whether any contract existed between the company and Gibson. It was admitted that the company were bound by contract to indemnify Smith & Knight against Gibson's claim; but there were equities and set-offs existing which made it important to resist the present claim.

Sir R. Baggallay and *Mr. Westlake* for the official liquidator.

Mr. Jessel and *Mr. Chitty* for Mr. Gibson.

Their LORDSHIPS held that, though in an ordinary case, such as a change of partners in a firm, slight evidence of the assent by the creditor to the change of debtors or to the addition of a new debtor was sufficient to constitute a contract, yet, after the letter of August 12, 1864, repudiating any connection with the company, strong evidence was here necessary to establish the acceptance by Gibson of the company as his debtors, and none such was forthcoming, therefore it could not be considered that any contract ever existed between the company and Gibson, and the claim must be disallowed. They discharged, therefore, the order of the MASTER OF THE ROLLS.

LORDS JUSTICES. June 1. — *In re* HUMBER IRON WORKS COMPANY. *Ex parte* WARRANT FINANCE COMPANY.

Winding-up of Company—Interest on Debts.

The question in this appeal was whether a dividend ought to be paid upon interest accruing after the date of the winding-up. The MASTER OF THE ROLLS held that the dividend should be paid upon the interest due at the date of each declaration of dividend.

Mr. Southgate and *Mr. Wickens* for the appellant, the official liquidator.

Sir R. Baggallay and *Mr. Eddis* for the Warrant Finance Company, the creditors in question.

Their LORDSHIPS held that the dividend in the case of an insolvent company ought to be paid only upon the interest due at the date of the winding-up. Though, if the company's estate would ultimately pay in full, then the whole interest accruing after the winding-up, according to the contract, would have to be paid.

LORD ROMILLY, M.R. May 29, 31. — *In re* THE COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST.

Companies Act, 1862, *s.* 160—*Winding-up—Compromise—Sanction of Court.*

The above-named company had, in 1864, been incorporated by charter obtained by certain members of an older corporation called the Commercial Bank of India, to whose business the present corporation had succeeded. The present corporation having, by order dated May 28, 1866, been ordered to be wound up, many intricate and expensive litigated questions arose between various classes of creditors and contributories, and in particular a suit was instituted by the older against the present bank, involving claims to a large amount.

In order to put a stop to the enormous litigation which was otherwise inevitable, a compromise was arranged between the creditors and contributories, the main features of which were that a sum of 10,000*l.* was to be paid to a committee of contributories, and that creditors were to accept 17*s.* in the pound.

This scheme was approved by 821 out of about 1,100 creditors, only 8 dissenting, the remainder being silent; the assenting creditors representing 2,250,000*l.*, and the dissenting 23,000*l.* in value. Of the contributories, 332 holding nearly two-thirds of the shares assented, one dissented, and 102 were silent.

This was a petition by the official liquidator to obtain the sanction of the Court to the compromise under section 160 of the Companies Act, 1862, with the view of binding all parties.

Sir R. Baggallay and *Mr. Kekewich* for the petitioners.

Mr. Southgate and *Mr. H. F. Bristowe* for the old bank.

Mr. Jessel, Mr. W. F. Robinson, Mr. Swanston, Mr. Fischer, Mr. Lindley, and *Mr. Ferrers* for other parties.

Mr. Devigne, a creditor for 3,600*l.* (one of the eight who dissented), opposed the application in person.

THE MASTER OF THE ROLLS expressed a very strong opinion that the compromise would be greatly for the advantage of all parties, including the dissentient creditors. It met with his entire approval, his only doubt being as to the jurisdiction of the Court to make it compulsory. He had, however, read the judgment of the Privy Council in *The Bank of Hindustan, China, and Japan* v. *The Eastern Financial Corporation*, on March 15, 1869, in which it was held that, under the similar section of the Indian Companies Act, a Supreme Court in India had such jurisdiction. The scheme was therefore sanctioned.

LORD ROMILLY, M.R. June 1, 8. — THE WATFORD AND RICKMANSWORTH RAILWAY CO. *v.* THE LONDON AND NORTH WESTERN RAILWAY CO.

Railway Company—Jurisdiction—Account—Railway Companies Arbitration Act, 1859.

This was the hearing on motion for decree of a suit to obtain a declaration of the rights of the two companies, and for the taking of accounts under an agreement made between them, and dated June 16, 1862, and which was in effect an agreement for the working of the line of the plaintiff company by and at the expense of the defendant company, on the terms of the defendant company receiving the tolls and paying to the plaintiff company 50 per cent. of the gross earnings. The agreement also contained a clause under which any difference which should arise between the two companies touching the construction, or any thing done in pursuance, or any of the incidents or consequences, or any breach or non-fulfilment, or any liability, damages, losses, costs, or expenses by reason of any breach or non-fulfilment, of the agreement, should be referred to and determined by arbitration, according to the provisions of the Railway Companies Arbitration Act, 1859.

The plaintiff company claimed an account and payment of 50 per cent. of the gross earnings. The defendant company claimed to be entitled to set off against the plaintiffs' claim certain items for expenses alleged to have been incurred in completing the line, and for certain tolls for the use of Watford station, and for rent and services prior to the time fixed for the commencement of the agreement.

By their answer, and also at the hearing, the defendant company insisted that the remedy of the plaintiff company was either by action at law or by a reference to arbitration under the agreement, and not by a suit in equity.

Mr. Locock Webb (*Sir R. Baggallay* with him) for the plaintiff company.

Mr. Speed for the defendant company.

THE MASTER OF THE ROLLS said that the account was evidently so complex, that if tried at law it would at once be ordered to be referred. It was, therefore, so far a fit subject for a suit in equity. A more serious difficulty, however, arose from the arbitration clause, the words of which, coupled with sections 2 and 26 of the Railway Companies Arbitration Act, 1859, ousted the jurisdiction of the Court, and rendered a reference to arbitration compulsory. If, however, the defendant company would waive their right to insist on this objection, and if the amounts in dispute could be agreed on and both parties would consent to the proposed course, he would be willing to decide in Chambers the rights of the parties under the agreement, which would save much expense. If, however, the defendant company insisted on a compulsory reference, he must dismiss the bill, but without costs, as the objection ought to have been pleaded in bar to the suit.

LORD ROMILLY, M.R. June 1, 3, 7. — *In re* THE BLAKELY ORDNANCE COMPANY (LIMITED). *Ex parte* THE METROPOLITAN AND PROVINCIAL BANKING COMPANY.

Company—Winding-up—Creditor's Right to Prove—Collateral Security.

The Blakely Ordnance Company, now in liquidation, had given bills for 4,000*l.* to the above-named bank to secure a debt of that amount due from the company to the bank.

As a further security for this debt, the company delivered to the bank thirty-two debentures of the nominal value of 250*l.* each, making the nominal value of 8,000*l.*, which were issued by Captain Blakely, the manager and agent of the company in that behalf authorised. These particular debentures had originally been made payable to one Challis or bearer, and had been issued with the intention of their being delivered to Challis in respect of some transaction which was not carried out. The debentures, instead of being handed to Challis, were, therefore, retained by Captain Blakely, as the company's manager, until they were delivered to the bank as above stated.

This was a summons by the bank (who had been admitted to proof, in respect of the bills, for 4,000*l.*) to be now allowed to prove for an additional 8,000*l.* in respect of the debentures. The bank did not, however, claim to be entitled to receive more than payment of 4,000*l.* in full.

Mr. Southgate and *Mr. R. E. Turner* (common law bar) for the bank.

Sir Richard Baggallay and *Mr. J. N. Higgins* for the company.

THE MASTER OF THE ROLLS said that this was not the case of a creditor realising a security by way of mortgage or pledge, and then being allowed to prove for his whole debt, and not merely for the balance, which was

now the established rule; but it was a mere repetition of obligations by the company, in the shape of additional promises to pay, without any substantial security, and a creditor could not be allowed to multiply his dividend by proving on several classes of such obligations at once. The summons would, therefore, be dismissed, but without costs.

STUART, V.C. May 22. } FALLOWS *v.* SLATTER.

County Court—Plaint—Appeal, Cost of.

Mr. Coote, a defendant to a plaint filed in the County Court of Huntingdon, appealed against the decree and order on further consideration made against him, and the VICE-CHANCELLOR (as reported *ante*, p. 71) held that he had improperly been made a defendant, and reversed as to him the original decree and the order on further consideration, giving costs of and including the original decree.

Mr. Bristowe now moved, on behalf of Mr. Coote, to vary the order as drawn up by the registrar, on the ground that it did not give him the costs of the appeal. It was the universal rule at law that the successful party on an appeal from a County Court should have his costs of appeal, unless there were special circumstances, which must be of a substantial character: *Foster* (*Appellant*), *Smith* (*Respondent*), 18 C.B. 161; *Schroder* v. *Ward*, 13 C.B. N.S. 10: and it was most important that this rule should be followed in equity, otherwise a successful appeal would in many cases be worse than useless.

STUART, V.C., said that the rule of law that costs should follow the result of an appeal had never been the rule in the Courts of Equity, which took into consideration the conduct of the parties and other circumstances in determining the question; and that rule should not be introduced by him. His HONOUR considered that a respondent who had been successful in the Court below ought not to be made to pay for the mistakes of the judge.

Motion refused.

STUART, V.C. May 28. } *Re* TUTIN'S TRUSTS.

This was a petition by Dorothy Robinson, a married woman living separate from her husband, for the settlement of the whole of a fund of 303*l.* 15*s.* 3*d.* Consols, to which she was entitled as one of the next of kin of one Tutin, deceased, by whose administrator the stock had been transferred into Court.

It appeared that the petitioner had not been deserted by her husband, but that ten years ago he had refused to become a Roman Catholic, and was thereupon turned out of his mother-in-law's house, where his wife resided, and that his wife had ever since refused to live with him, and had supported herself and their child by needlework. The husband, who lived in the same town, was a day labourer.

Mr. Karslake and *Mr. Martineau* for the petitioner.

Mr. T. H. McLachlan (*Mr. Dickinson* with him) for the husband.—This is not a case of misconduct or desertion by the husband; nor is the fund, considering the position of the parties, so small as to prevent the Court, in the exercise of its discretion, from dividing it instead of settling the whole (*Re Suggitt's Trust*, 37 Law J. Rep. (N.S.) 426.

STUART, V.C., declared the petitioner entitled to a settlement of the whole fund, and directed it to be settled upon her for her separate use for life, with remainder to the children of the marriage, in the usual way, and, in default of children, for the wife absolutely, if she survived her husband, and if not, then to the husband absolutely.

MALINS, V.C. June 4, 5. } *Re* BROOKMAN'S TRUSTS.

Will and Settlement—Covenant by Settlor to Give a Share of his Property by Will—Death of the Object of the Covenant—Wills Act, 1 *Vict. c.* 26, *s.* 33.

Thomas Brookman, by articles executed upon the marriage of his daughter in 1828, covenanted that if his daughter survived him, or died in his lifetime leaving issue, he would by will or otherwise effectually give to trustees a child's share in his estate, subject as therein mentioned, upon trust for his daughter for life, then for the husband for his life, defeasible upon his bankruptcy (which event occurred), with remainder to the children of the marriage upon their attaining twenty-one years, in the usual manner. There were three children of the marriage, of whom only one, William, attained the age of twenty-one years; they all died in the settlor's lifetime. The settlor, by his will, gave to trustees a fourth share in his residuary estate upon trust for the wife for life, upon her decease for her husband for life, and upon his decease or forfeiture for the chi d or children of the marriage. The testator's daughter survived him, and died in 1867. The question raised upon this petition was whether, under the circumstances, the son William took any interest in the testator's estate, either under the will or under the articles.

Mr. Glasse and *Mr. Jason Smith* for the assignees in bankruptcy of the father, who represented the son's interest.

Mr. Hardy and *Mr. Everitt* for the next of kin of the wife, who took if the son did not.

Mr. Speed for the trustees.

The VICE-CHANCELLOR said, if the right of the son depended on the will only, his death in the lifetime of the testator would cause the legacy to lapse. But in his opinion his rights depended not on the will, but on the marriage articles. If, instead of covenanting to give a 'share,' the settlor had covenanted upon his death to pay 10,000*l.* upon the trusts of the marriage articles, clearly the children would have taken a vested interest at their birth, subject to being divested on their dying under the age of twenty-one. What justice was it that the interest of a child of the marriage should be defeated because the settlor had chosen in the articles to make the sum uncertain? The case of *Jones* v. *How*, 7 Hare, 267, which was cited against the claim of the son, was unsatisfactory as disappointing the evident intention of the parties. Even there Vice-Chancellor Wigram thought that if the covenantor had made a provision by will in favour of his daughter, and she had left issue living at her death, section 33 of the Wills Act would have prevented a lapse. In the present case the testator reserved to himself complete power over his property during his lifetime, but had expressly contracted himself by the articles out of the power of dealing by will with the 'child's share' given by those articles, and that share had accordingly vested in William absolutely on his attaining twenty-one. There must be a declaration to that effect. As to the bankruptcy of the father, his own interest was thereby

forfeited, but not that which he took by operation of law as representing his son. The share would therefore be paid to the father's assignees in bankruptcy.

James, V.C. June 1. } *Re* The North Kent Extension Railway Company.

Railway—Construction—Winding-up after Abandonment—Railway—Companies Act, 1867, s. 31.

This was a petition by a creditor for compulsory winding-up of the above company, after a warrant of abandonment had been made by the Board of Trade under section 32 of the Railway Companies Act, 1867.

Mr. J. N. Higgins, for the company, took the preliminary objection that the petitioner was not a shareholder.

Mr. Kay and *Mr. Bradford*, for the petitioner, cited the Railways Abandonment Act, 1850, s. 31, which provides that where any such warrant as aforesaid shall have been granted for the abandonment of the whole railway of any railway company in England or Ireland, any shareholder of such company may present a petition under the Joint-Stock Companies Winding-up Act, 1848, or any Act for the amendment of such Act, for the winding-up of the affairs of such company under the said Act, and for that purpose the railway company whose railway is so authorised to be abandoned shall, if the Court think fit so to order (notwithstanding anything to the contrary thereof in the said Joint-Stock Companies Winding-up Act, or in the Joint-Stock Companies Winding-up Amendment Act, 1849) be deemed to be a company to which the said Act applies. They argued that though according to the strict construction of the Railway Companies Act, 1867, s. 31, only those persons could petition to wind up the company who could have done so under the Railways Abandonment Act, 1850, s. 30, that is to say, those could have done so under the Winding-up Acts of 1848 and 1849; yet the intention of the Legislature must have been to embody the existing state of the law and give all the facilities for winding-up which other companies enjoyed under the Companies Act, 1862, and the section ought to be construed literally in that sense.

James, V.C., dismissed the petition with costs. The plain meaning of the Act was that the petition should be presented by shareholders only. It had been carefully prepared, and could not be dealt with like the will of an ignorant testator.

James, V.C. June 3. } *In re* The European Central Railway Company. Gustard's Case.

Company — Contributory — Application — Alteration in Amount of Shares — Allotment.

Adjourned summons. Application by official liquidator to settle Gustard on list of contributories of the above-named company in respect of twenty shares of 40*l.* each. The prospectus and memorandum of association of the company stated that the capital of the company was divided into shares of 20*l.* each. Upon the faith of these documents Gustard, early in 1864, applied for twenty-five shares. Before any allotment was made, a special resolution of the company was passed, converting the amount of each share from 20*l.* to 40*l.*; twenty of these last-mentioned shares were allotted to Gustard; the letter of allotment did not mention the amount of the shares allotted. Subsequently, in May 1865, upon finding out that he had 40*l.* shares instead of 20*l.* shares, Gustard, in order to get rid of these shares by an arrangement to which the company were parties, purported to transfer his shares to Holden, but the transfer had never been registered. Gustard now sought to repudiate the shares, principally upon the ground that he had never applied for nor agreed to take 40*l.* shares.

Mr. Amphlett and *Mr. Locock Webb*, for Mr. Gustard, upon admitting that he was *prima facie* on the register of shareholders, were heard first.

Mr. Kay and *Mr. Bardswell* for the official liquidator.

James, V.C., said Gustard was liable as a contributory in respect of twenty shares of 20*l.* each. He applied for 20*l.* shares in ignorance of the resolution converting them, and the company allotted him twenty shares. There was then a binding contract between him and the company. His Honour did not think that, when he learnt the shares allotted were 40*l.* each, he was bound to take steps to alter the register. There had been no acquiescence on his part sufficient to create a fresh contract with the company. He had been a member of the company all the time, and must take twenty shares of 20*l.* each.

James, V.C. June 5. } *Re* Bogg's Estate.

Practice—Costs—Trustees beneficially Entitled—Separate Use—Petition served on Husbands.

This was a petition for reinvestment of the purchase money of leaseholds taken by a railway company. They formed part of the residuary estate of a testator who had bequeathed it upon trust to pay the income thereof to his widow until his younger child should attain 21; then to pay one moiety of such income to the widow, and the other moiety to the children in equal shares—as to the daughters, for their separate use; the whole to be divided among the children after the death of the widow. There were two daughters, both of whom were married, and all the children were of age. The trustees of the will were the widow and one of the sons. The petition was presented by the widow and all the children, and was served on the company and also on the husbands of the married daughters.

Mr. Ingle Joyce for the petitioners.

Mr. Phillpotts and *Mr. Method* for the two husbands.

Mr. Sargant, for the company, objected to pay the husbands' costs, on the ground that (1) the petition ought to have been presented by the trustees alone, they being entitled to receive the rents and profits of the leaseholds (which had been directed not to be sold); and (2), even if the daughters were rightly made co-petitioners, their husbands need not have been served.

Mr. Ingle Joyce, for the petitioners: The trustees cannot sufficiently represent the trust estate where they are themselves beneficially entitled; and here the widow's interest is adverse to that of the children.

James, V.C., said the petition was properly framed and that the husbands were rightly served.

James, V.C. June 5. } *Ex parte* The South-Western Railway Company.

Practice—Costs of Respondents Appearing when not Interested.

The company, having entered upon certain lands before purchase, gave a bond and made the usual de-

posit under section 85 of the Lands Clauses Act, 1845. Afterwards, being unable to find the true owner, they proceeded, under section 79, to have the land valued by a surveyor, and paid the money so ascertained into Court. They then presented a petition under section 85 to have their original deposit returned to them; but the Court, being of opinion that the Act had not been complied with, dismissed the petition. They then summoned a jury under the provisions of the Act, who assessed the value at 600*l.*, both the above-mentioned claimants attending the proceedings. The company, having paid the 600*l.* into Court, now petitioned for payment of the deposit-moneys and the moneys paid in under the first assessment, and made both the said claimants respondents. An objection was taken to the respondents' costs on the ground that they could not now be interested in anything except the 600*l.*, and *Day v. Croft*, 19 Beav. 518, was cited to show that a respondent appearing unnecessarily ought not to have them.

Mr. M. Cookson for the petitioner.

Mr. Jenkinson for the respondents.

JAMES, V.C., thought the proper course would have been for the company to tender such sum as would cover the cost of taking advice from a solicitor as to whether they were interested or not, with an intimation that if, after that, they chose to appear, their costs would be objected to. This not having been done, the costs must be according to the Act.

JAMES, V.C. June 5. } WILKES *v.* COLLINS.

Merger—Specific Bequest—Exoneration.

The testator, Samuel Fiske, was entitled, under his marriage settlement, to the income (subject as therein mentioned) of a sum of 3,300*l.* Reduced Bank Annuities, and of another sum afterwards reduced to 2,533*l.* 6*s.* 8*d.* like annuities, and to the absolute reversion in both funds, subject to the life interest of his wife and the trusts for the issue of the marriage (if any). The trustees sold out the first-mentioned sum and advanced to him the proceeds, amounting to 3,072*l.* 2*s.* 6*d.* on mortgage of an estate called 'Farmedine,' at Saffron Walden, in Essex. Subsequently, by his will he devised his Farmedine estate and all other his real estate to his said wife for life, with remainder to the plaintiff in fee; and he gave 'all and every the shares and sums of money in the public funds or upon Government or real securities, which he should die possessed of or in anywise entitled to,' unto certain trustees upon trust as to the income for his said wife for life, and after her decease for the plaintiff for life, then for the plaintiff's wife for life, and after the decease of the survivor of them, in trust for the child or children of the plaintiff as therein mentioned; and he made his said wife his sole residuary legatee and executrix. The testator died in the lifetime of his wife without issue, not having had at the date either of his will or of his death any 'shares or sums of money in the public funds or upon Government or real securities' other than and except his reversionary interest in the two funds above mentioned. The testator's widow died in 1868, leaving the defendant Roberts her sole legal personal representative, and the two funds aforesaid having thus become part of the testator's personal estate, the questions arose—(1) whether the mortgage debt was merged in the Farmedine estate; (2) whether the beneficial interest in the mortgage debt (if not merged) and the other fund passed under the specific bequest to the children of the plaintiff; and (3) whether, if so, the plaintiff was entitled to have the mortgage debt paid out of the general personal estate of the testator.

Mr. Kay and *Mr. Davey* for the plaintiff.

Mr. Rendall for the plaintiff's children.

Mr. Amphlett and *Mr. Wickens*, for the defendant Roberts, were not called upon on the question of merger.

JAMES, V.C., said that the testator had not at the time of his death that absolute interest both in the charge and in the estate subject to the charge which could give him a right to merge the one in the other, and therefore raise the presumption that he intended to do so. The other two questions were answered in the affirmative.

JAMES, V.C. June 7. } COX *v.* COX.

Appropriation—Principal and Interest—Bond to Trustees—Insolvent Obligor.

Special case. Cox gave his bond to the trustees of his marriage settlement for payment to them three months after his death of a sum of 6,000*l.* with interest at 5 per cent. from that date. He died insolvent. This was the only specialty debt affecting his estate, and accordingly had priority over his other debts. But his assets were insufficient to pay more than about 5,700*l.*, and besides the principal sum of 6,000*l.* there was 1,625*l.* 12*s.* 8*d.* due on the bond. The question was—(1) whether the 5,700*l.* was to be apportioned under the settlement as principal and interest; and (2) if so, upon what principle the apportionment was to be carried out.

Mr. Phear for the plaintiff.

Mr. Speed for the defendant.

JAMES, V.C., said there must have been some slip in *Grabowski's Settlement*, 37 Law J. Rep. (N.S.) Chanc. 926; Law Rep. 6 Eq. 12. The debt ought to have been paid three months from the death of the obligor. It would then have been invested by the trustees, and produced interest, say at 4 per cent., which would have gone to the tenant for life. The proper principle was to calculate what sum paid when this debt was payable, and invested then at interest at 4 per cent. would, together with the amount of such interest, have now produced 5,700*l.* That sum would represent the capital; the surplus would go to the tenant for life as income.

JAMES, V.C. June 7, 8. } AMORY *v.* BROWN.

Pleading—Patent Suit—Averment of Novelty in Bill.

Motion for decree in a suit to restrain defendants from using a patented invention, for an account of profits, and for damages.

The bill stated letters patent, dated February 6, 1867, granting to C. E. Brooman, his executors, administrators, and assigns, the exclusive right of making and using 'an invention for "a new method of manufacturing and applying artificial pearls or beads," communicated to the said C. E. Brooman from abroad.' The bill contained no other averment that the invention was a new one. The plaintiffs were Brooman's assignees and their licencees.

Mr. Amphlett, *Mr. Theodore Aston*, and *Mr. Dundas Gardiner* for the plaintiffs.

Mr. Tripp, for the defendant, argued that, without

an express allegation of the novelty of the patented invention. the pleadings were defective. He contested the novelty of the invention.

James, V.C., said the plaintiffs, by their evidence, had satisfied him that the invention was a new one, and of great public utility, and had been introduced from abroad. The defendants relied upon the pleadings being defective by reason of the omission of any allegation as to the novelty of the invention. He had doubted at first whether such an averment was not necessary, though if it had been he should have allowed the hearing to stand over till the technical defect had been remedied. But on looking to the short form of a declaration in an action at law for damages for the infringement of a patent, he found in it no such allegation of novelty; and accordingly he thought the bill sufficient without it. If a defendant meant to object to the patent for want of novelty, he should raise the objection by his answer.

Courts of Common Law.

Queen's Bench. (*Magistrate's Case.*) June 2. } Edwards (Appellant) *v.* Township of Rusholme (Respondent).

Poor-Rate—Persons Removing out of Parishes—Proportion of Rate Payable by Incoming and Outgoing Tenant—17 Geo. II. c. 38, s. 12.

By 17 Geo. II. c. 38, s. 12, after reciting that persons frequently remove out of parishes and places without paying the rates assessed on them, and other persons do enter and occupy their houses and tenements part of the year, by reason whereof great sums are annually lost to such parishes and places, it is enacted that where any person or persons shall come into or occupy any house, land, tenement, or hereditament, or other premises out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming in or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner and under the like penalty of distress as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate, which proportion, in case of dispute, shall be ascertained by any two or more of His Majesty's justices of the peace.'

It appeared that on October 25, 1866, the respondents, the overseers of the township of Rusholme, made a poor rate for the ensuing eleven months. At the date of the rate the appellant was the tenant and occupier of a dwelling house in the township, but he left it on November 8, and the house remained empty until May 10, when another tenant entered into possession. After the entry of this tenant the respondents proceeded to apportion the rate, and charged the appellant with rather less than six and a half months of the whole of the rate, extending over the time between October 25, 1866, the date of the making of the rate, up to May 10, 1867, when the new tenant entered into occupation, and charging the new tenant with the remaining proportion of the rate.

J. Kay, for the appellant, contended that the appellant was only liable to pay the proportion of the rate for the time he occupied the house—namely, fourteen days.

Ambrose for the respondents.

The Court (Cockburn, C.J., Mellor, J., Lush, J., and Hayes, J.) gave judgment for the respondents. The object of the Legislature was not to effect any equitable adjustment of the rate between the outgoing and the incoming tenant, but merely to protect the interests of the parish officers by imposing a liability on the incoming tenant. The appellant was, therefore, bound to pay for the whole of the time up to the entry of the new tenant.

Judgment for the respondents.

Queen's Bench. June 2. } Regina on the Relation of Farnell *v.* Diplock.

Coroner—Sheriff's Court for Electing Coroner—Proclamation of Election a Judicial Act—Quo Warranto.

Quo warranto to try the title of T. Diplock to the office of coroner for the western district of Middlesex.

Plea that a writ was addressed to the sheriff for the election of a coroner, and that the sheriff duly held a Court for this purpose, that a poll was taken, and that the sheriff openly declared the state of the poll, and made proclamation that Diplock was duly chosen, and that Diplock was duly sworn and took the oath required. Demurrer to the plea and joinder in demurrer.

Second replication, that Diplock was not elected to the office of coroner by a majority of valid voters duly qualified to vote at the election. Demurrer to this replication and joinder in demurrer.

Keane (*Day* with him) for the relator, in support of the replication.

Gray for the defendant.

The Court (Cockburn, C.J., Mellor, J., Lush, J., and Hayes, J.) held that the plea was good, although it did not aver that the coroner was elected by a majority of the legal votes; for the sheriff, in holding his Court and in taking the poll, was exercising a judicial function, and that the correctness of his decision could not be reviewed by a jury.

Judgment for the defendant.

Queen's Bench. June 3. } Welfare *v.* The London and Brighton Railway Company.

Evidence of Negligence—Railway Company—Passenger.

This was an action against the defendants to recover damages in respect of an injury alleged to have been caused by their negligence.

On the trial before Blackburn, J., the plaintiff was nonsuited.

The evidence showed that the plaintiff went to the station of the defendants with intent to travel by their line. He was late for the train, and upon inquiring of a porter as to when the next train would start, he was directed to a covered place where there was a time-bill. While standing looking at the bill, a roll of zinc and a plank fell upon him, and upon looking up he saw the leg of a man. There was nothing to show who the man was, or whether he was in the employ of the defendants, or whether the roof needed repair, or what the man was doing.

The rule was obtained to set aside the nonsuit, and for a new trial.

Huddleston and *Lopes* showed cause.

C. Wood supported it.

Per Curiam (COCKBURN, C.J., BLACKBURN, J., MELLOR, J., and LUSH, J.) The rule must be discharged, there being nothing to show that the man on the roof was himself guilty of any negligence. If he is not shown to have been so, the maxim *respondeat superior* does not apply, and there is nothing whatever to show that the defendants knew that the roof was in a state which made it dangerous for any person to go upon it.

Rule discharged.

Queen's Bench.
June 4.

EVANS (ADMINISTRATOR) *v.* BIGNOLD.

Life Insurance—Name of Person Interested not Inserted in Policy—Policy on Life of Married Woman—14 *Geo. III. c.* 48, *s.* 2.

Declaration by the plaintiff, as administrator of Mary Ann Evans, his wife, upon a policy made by the Norwich Union Life Insurance Society upon her life. Plea, that the policy was in fact made by the plaintiff in the name and on the pretended behalf of Mary Ann Evans, but for the use and benefit of the plaintiff, and that his name was not inserted in the policy as the name of the person interested therein, or on whose account the policy was made, and that the policy was unlawful.

It appeared from a special case stated for the opinion of the Court, that Mary Ann Evans, the wife of the plaintiff, to whom she was married during her minority, was entitled to a sum of money on attaining the age of twenty-one, under her father's will, and that after marriage and during her minority her husband applied to the trustees of her father's will to advance him a sum of money in part payment of his wife's legacy, which they agreed to do upon having the money secured by a Mr. Jacobs, and Jacobs consented to become security upon condition that a policy was effected on the life of Mrs. Evans. A policy was accordingly effected with the defendants, reciting that Mary Ann Evans, 'wife of William Evans,' had agreed to effect a policy of insurance on her life, and going on to insure it in the sum of 200*l.* The name of the husband was not inserted in the policy as the person interested in it. Mary Ann Evans died before attaining the age of twenty-one, and the present action was commenced.

By 14 Geo. III. c. 48, after reciting that it has been found by experience that the making insurances on lives or other events wherein the assured shall have no interest has introduced a mischievous kind of gaming, it is enacted that, from and after the passing of the Act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account, such policy or policies shall be made shall have no interest, or by gaming or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

By section 2: It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwritten.

Pinder, for the plaintiff, while admitting that if the husband had effected an insurance upon his wife's life it would have been necessary to insert his name in the policy, contended that in the present case there was nothing to show that the policy was for the benefit of the husband or of any one but the wife after she came of age, so that he must be taken to have allowed her to acquire an interest in the policy which was a chose in action like a bond, and it was therefore unnecessary to insert his name. He cited *Fleet v. Perrins*, 37 Law. J. Rep. Q.B. 233.

The COURT (COCKBURN, C.J., MELLOR, J., LUSH, J., and HAYES, J.), stopping *H. T. Cole* (*Raymond* with him), for the company, gave judgment for the defendants. The statute, though it might operate harshly in the present case, was based upon sound principles, as the object of it was to prevent one person having an interest in the destruction of another. Even admitting that the wife had a contingent interest in the policy after the loan was paid off, this would only make it necessary to insert both her name and her husband's in the policy, which had not been done, so that the policy was void.

Judgment for the defendants.

Queen's Bench.
May 28, 1868.
June 7, 1869.

REGINA *v.* WOOD.

Sale of Bread otherwise than by Weight—'French or Fancy Bread'—6 & 7 Wm. IV. c. 37, *s.* 4.

By 6 & 7 Wm. IV. c. 37, s. 4, it is enacted that 'from and after the commencement of that Act all bread sold beyond certain limits out of London shall be sold by weight, provided that nothing in the Act shall extend or be construed to extend to prevent or hinder any baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls, without previously weighing the same.' The appellant had been convicted of selling without previously weighing bread which at the time of the passing of the Act was usually sold under the denomination of fancy bread, but which at the time of the sale had ceased to be sold under that denomination, the magistrates holding that the bread had therefore ceased to be exempted. Upon appeal to the Court, the case was argued by

Mellish (*J. Thompson* with him) for the respondent; and

Denman and *Oppenheim* for the appellant.

The COURT now delivered judgment, LUSH, J., and HAYES, J. thinking that, as the bread had now become a common article of consumption, it was no longer within the meaning of the proviso, which applied only to bread of an exceptional quality. The Legislature could not have meant to stereotype a particular article, and to say that, because it was an article of luxury at the time of the passing of the Act, it must continue to be so for all time.

HANNEN, J., dissented, thinking that the Act related to what was then usually sold as fancy bread, and not to what should 'from time to time' be sold under that denomination. A different construction would make 'rolls' liable to be sold by weight, because they were now more frequently consumed than when the Act was passed.

Conviction affirmed.

Queen's Bench. June 7. REGINA *v.* KENNETT. REGINA *v.* SAUNDERS.

Sale of Bread otherwise than by Weight—French or Fancy Bread—6 & 7 Wm. IV. c. 37, s. 4.

In one of these cases the appellant was asked by a policeman for a four-pound loaf, and sold him a loaf which was deficient in weight. In the other, the facts were similar, except that the loaf asked for was a two-pound loaf. It appeared that the bread was not baked in batches like ordinary household bread.

Mellish for the appellant.

Maule for the respondent.

The COURT (COCKBURN, C.J., MELLOR, J., and HAYES, J.) now delivered judgment, holding that as the loaves were sold as four-pound and two-pound loaves, the bakers could not avail themselves of the defence that the bread was fancy bread within the proviso, and that as the bread was short weight, it could not be presumed that it had been weighed before sale.

Convictions affirmed.

Queen's Bench. (Magistrates' Case.) June 8. THE GUARDIANS OF THE POOR OF THE MACHYNLETH UNION (APPELLANTS) *v.* THE CHURCHWARDENS AND OVERSEERS OF THE LOWER DIVISION OF THE PARISH OF POOL (RESPONDENTS).

Poor Law—Irremovability—'Union'—4 & 5 Wm. IV. c. 76, s. 109; 24 & 25 Vict. c. 55, s. 1.

This was a case stated under 12 & 13 Vict. c. 45, s. 11.

By an order of justices dated January 11, 1867, George Rowland was ordered to be removed from the lower division of the parish of Welchpool to the parish of Penyoes. The order was appealed against on the ground that the pauper was irremovable, because he had resided in the union in which the parish of Welchpool, the respondent parish, was situate for more than a year before the making of the said order.

The lower division of the parish of Pool, or Welchpool as it is sometimes called, is a township or place separately maintaining its own poor; and the two other divisions of the said parish, namely, the middle and the upper divisions of Pool, also separately maintain their poor, and each division has its own churchwardens and overseers, makes its own assessments, and raises its own rates as provided for by 6 Geo. IV. c. 123, under which the parish of Pool and a number of other parishes and townships were to continue and remain one incorporated, entire and united district, and to be called the Montgomery and Pool United District. The Act of Parliament is administered within the district by the guardians and directors of the united district, who hold a house of industry in the district, but each parish or place has the separate and distinct care of its poor, except when they are in the house of industry, when they are under the care of the directors.

The pauper had, immediately before February 3, 1866, resided in the middle division of the parish of Pool for several years, and was irremovable therefrom under 9 & 10 Vict. c. 66. On that day he removed to the lower division, and there continued to reside until the order was made. The question raised by the case was whether the residence in the middle division might be joined with the residence in the lower division, so as to render the pauper irremovable.

Poland contended that the pauper was irremovable, as the united district was a union within the meaning of 24 & 25 Vict. c. 55, s. 1.

M'Intyre contra.

Per Curiam (COCKBURN, C.J., MELLOR, J., LUSH, J., and HAYES, J.).—The pauper was irremovable. The district must be construed to be a union within the meaning of 4 & 5 Wm. IV. c. 76, s. 109, and 24 & 25 Vict. c. 55, s. 1; and as the pauper was resident in one or the other division for more than one year before the order was made, there must be judgment for the appellants.

Judgment for the appellants.

Common Pleas. June 3. THE FINANCIAL CORPORATION *v.* LAWRENCE.

Action for Calls—Deed of Inspectorship—Winding-up.

Declaration for calls. Plea, that the company was being wound up, that the action was by the liquidator, and that the defendant was a shareholder at the time of the execution of a deed of inspectorship set out in the plea.

Replication, that the calls were made before the winding-up commenced, and after the execution and registration of the deed, and payable subsequently thereto.

Rejoinder, that when the call was made and payable, and the winding-up commenced, the deed was in force, the estate being administered, and no part thereof assigned under clause 21 of the deed, and no certificates under clause 23 thereof (clauses to which it is unnecessary to allude).

Demurrers to the replication and rejoinder.

C. Russell and *Williams* for the plaintiffs.

Theriger for the defendant.

The COURT held that at the date of the deed there was no liability, which would have been ascertainable and proveable in bankruptcy if this had been a case of bankruptcy, and that therefore the liability was not within the deed, and the plaintiffs were entitled to succeed.

Common Pleas. (Magistrate's Case.) June 3. CLARKE *v.* CROWDER AND OTHERS.

Game—Search by Constable on Highway—24 & 25 Vict. c. 114—Case stated by Justices.

The respondents had been summoned under 24 & 25 Vict. c. 114, under the following circumstances:—The police saw the respondents with bulky pockets on the highway; they ran away and got out of sight, but ten minutes afterwards the police arrived at the house of one of them, broke it open, and found therein all the respondents, and rabbits and nets. The magistrates held that the respondents had been unlawfully on land, &c., but refused to convict because they thought that there must be a search on the highway as a condition precedent, and now asked the opinion of the Court as to whether this was necessary.

Kemplay for the appellant.

Sturge for the respondents.

The COURT held that as there was no finding, actual or constructive, of the game, &c. on the highway, the decision of the magistrates was right. The COURT were also inclined to think that a seizure on the highway was necessary.

Common Pleas. June 4. } SYKES AND OTHERS *v.* SYKES AND ANOTHER.

Security for Costs—Suit by an Insolvent Executor.

The plaintiffs in the action were one Sykes and a Mrs. Shaw and her husband, Sykes and Mrs. Shaw suing as executor and executrix of a deceased person, and the husband being joined for conformity; the defendants were the Sheriff of Yorkshire and a judgment creditor. It appeared that Sykes was abroad, and Shaw, the husband, a bankrupt. An order had been made for the plaintiffs to give security for costs, and the plaintiffs now sought to set it aside.

Kemplay for the plaintiffs.

C. Russell and *Forbes* for the defendants.

The COURT held that the fact of Sykes being abroad did not matter, as the other plaintiffs were in England, and as respects the insolvency of Shaw, that an executor sues in his own right, and does not fall within the rule that an insolvent nominal plaintiff suing in truth for another person may be called on to give security, and that the order was therefore bad.

Common Pleas. June 8. } THE NEW QUEBRADOR COMPANY *v.* CARRS AND OTHERS.

Bankruptcy—Mutual Credit—Bankruptcy of One of several Debtors—Set-off—12 & 13 Vict. c. 106, s. 171.

This was a demurrer to a replication.

The declaration was against three defendants for calls.

The plea alleged a set-off.

The replication stated that, after the cause of action accrued, and after October 11, 1861, and after the commencement of the suit, and before plea, the defendant Summers was adjudicated bankrupt, and his estate passed to his assignees.

To this replication there was a demurrer.

Holl, for the defendants, contended that, on the facts disclosed by section 171 of 12 & 13 Vict. c. 106, nothing passed to the assignees, and the set-off was allowable.

Archibald, for the plaintiffs, contended that this was not so, and that therefore there could be no set-off.

The COURT held that the section did not apply where one of several debtors became bankrupt; that the case fell within *Stammiforth* v. *Fellowes*, 1 Marshall, 184; and that the plaintiffs were entitled to judgment.

Common Pleas. June 8. } SANSON *v.* THE VESTRY OF THE PARISH OF ST. LEONARD'S, SHOREDITCH.

Metropolis—Apportionment of Rent Payable for Road—Right of Action.

This was a special case.

It appeared that by a local Act passed in the reign of Geo. III. power was given to trustees to buy lands to make a road, subject to the payment of rents to the vendors, recoverable by action; that the plaintiff's predecessors had sold land, and received a rent of 7*l.* a year till 1863; that by another Act passed in the reign of Geo. IV. there was a transfer of the road to certain commissioners, subject to the rents; and that by a Metropolitan Act passed in the year 1863 there was a transfer to the vestry of each parish through which it passed, of the management, &c. of so much of the road as was in the parish, subject to the quit rents and outgoings thereof. Part of the land, for which the rent of 7*l.* had been paid, was in the defendant's parish, and the action was to recover the rent.

Macnamara and *Jelf* for the plaintiff.

Herschel and *Thomas* for the defendants.

The COURT held that an action of debt on the statute lay against the defendants, but that only a proportionate part of the rent could be recovered from them.

Exchequer. June 1. } HOPKINS *v.* WARE, EXECUTORS, &c.

Payment by Cheque—Laches of Holder.

Action for money lent, &c. Plea of payment.

At the trial of this cause before MONTAGUE SMITH, J., *without a jury*, it appeared that the defendant's testator had borrowed 250*l.* of the plaintiff. After the testator's death, Lang, the defendant's solicitor, sent the plaintiff his own cheque for 258*l.* principal and interest, for which the plaintiff gave a receipt. The plaintiff, however, did not present Lang's cheque for payment till three weeks afterwards, when it was dishonoured. On the evidence given by the bank manager as to the state of Lang's account during the three weeks in question, MONTAGUE SMITH, J., found that 'if the check had been presented at once, there was reasonable ground for supposing that it would have been paid.'

A verdict was entered for the plaintiff, with leave to the defendant to move, on the ground that the cheque was given under circumstances which amounted to payment.

A rule having been obtained,

H. T. Cole and *M. Bere* showed cause.

Kingdon and *Pinder* supported it.

The COURT (BRAMWELL, B., and CHANNELL, B.) made the rule absolute, holding that (according to the finding of MONTAGUE SMITH, J., as to the chance of the cheque being paid) the defendant's position was prejudiced by the delay in presenting the cheque, and he was therefore entitled to treat it as payment.

Rule absolute.

Exchequer. May 29. } HARVEY AND OTHERS *v.* THE MAYOR AND CORPORATION OF LYME REGIS.

Statute, Construction of—Local Act—'Goods Landed within Harbour.'

Replevin for a boat. Avowry for tolls payable to the defendants in respect of goods 'landed' from the boat within the harbour of Lyme Regis. Plea denying that the goods were landed from the boat within the harbour.

At the trial it appeared that the defendants had for some time past allowed the plaintiffs to deposit limestone (brought in their boat from quarries in the neighbourhood) on a spot within the harbour situated between high and low water-mark. The stone was left there till exported in ships. The defendants' Act (1 & 2 Geo. IV. c. 99) authorised them to levy on all ships, &c.

which should come into, or use, or be at anchor within the cobb or harbour of Lyme Regis, and on all goods and things *landed* or shipped within the same, certain duties specified in schedules to the Act. One schedule affixed certain rates of tonnage to vessels over ten tons coming into the harbour, and another schedule contained rates on merchandise, and *inter alia* sixpence for every ton of limestone.

When the stone was again shipped for exportation rates were paid under one of these schedules. The defendants, however, now claimed duty on the stone when deposited, as on 'goods landed' within the harbour.

A verdict was entered for the defendants, and a rule having been afterwards obtained by the plaintiffs to set it aside,

H. T. Cole, Archibald, and *Bullen* showed cause, contending that the stone was 'landed' within the meaning of the Act.

Kingdon and *Lopes* supported the rule.

Kelly, C.B., Bramwell, B., and Cleasby, B., held that the stone was not landed within the meaning of the Act. Channell, B., was of a different opinion, but did not formally dissent from the judgment of the other barons.

Rule absolute.

Exchequer. June 4. } *Re* Greenwood.

Practice in Revenue Cases—Writ of Summons—Right to Begin.

Writ of summons against the executor of John Greenwood for the recovery of legacy duty and succession duty, commanding him within fourteen days from service to deliver an account, and pay legacy and succession duty, or to appear before the Barons of the Exchequer and show cause for default.

The defendant appeared and filed an affidavit in answer to the writ, setting out the will and the claim made by the Commissioners and disputed by the executor.

Crompton, for the executor, claimed the right to begin as being summoned to show cause.

The Court (Kelly, C.B., Bramwell, B., Channell, B., and Cleasby) held that it was more convenient that the Crown should begin and establish their right to the duty.

Collier, Attorney-General (Coleridge, Solicitor-General, and *Crompton Hutton* with him) accordingly began.

In the subsequent case of an appeal against a decision of the Inland Revenue Commissioners, the Court allowed the appellant to begin, adhering to the practice as settled in the *Marquis of Chandos* v. *Commissioners of Inland Revenue*, 6 Exch. 464; 20 Law J. Rep. Exch. 269.

Exchequer. June 7. } Winn *v.* Mogsman.

Right of Borough having Separate Commission of Peace, but no Court of Quarter Sessions, to Fines and Penalties —11 & 12 Vict. c. 43, s. 31—9 Geo. IV. c. 61, s. 26.

Special case stated in an action brought by the treasurer of the West Riding of the county of York against the clerk to the justices of the borough of Bradford to determine whether the county or the borough is entitled to receive—(1) fines and penalties imposed in respect of offences against the general law of the land in cases where the statute giving power to impose the penalties contains no directions for the payment thereof; (2) penalties under 9 Geo. IV. c. 61, s. 26, the Alehouse Licensing Act.

The right to the first set of penalties depended on the construction of 11 & 12 Vict. c. 43 (commonly known as Jervis' Act) s. 31.

Hannay (*Lascelles* with him), for the plaintiff, contended that the case was concluded in favour of the county by the recent case of *The Mayor, &c. of Reigate* v. *Hart*, 37 L. J. Rep. M.C. 70.

Manisty (*Kemplay* with him) maintained that the case was distinguishable from that case by reason of the fact found in the special case that the borough of Bradford had a separate commission of the peace under 5 & 6 Wm. IV. c. 76, s. 98, which the borough of Reigate had not.

The Court (Kelly, C.B., Bramwell, B., Channell, B., and Cleasby, B.) held that the existence or non-existence of a separate commission of the peace had not been a ground of decision in the case of *The Mayor, &c. of Reigate* v. *Hart*, which case governed the present.

Judgment for the plaintiff.

APPEAL FROM REVISING BARRISTER'S COURT.

Common Pleas. June 5. { Barnes (Appellant) *v.* Peters (Respondent). Perown (Appellant) *v.* Same. Bakewell (Appellant) *v.* Same.

Parliament—Borough Vote—Lodger Franchise—Cambridge University—College Chambers—2 Wm. IV. c. 45, s. 78—30 & 31 Vict. c. 102, ss. 4, 56, 59.

The question raised by these appeals was whether scholars, undergraduates, or fellows who had chambers in any of the colleges or halls of the University of Cambridge were entitled to the lodger franchise for the borough of Cambridge in respect of their occupation of such chambers. The annual value of the chambers occupied by the claimant in each case was of sufficient value to satisfy section 4 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), but the revising barrister had disallowed the claims on the ground that section 78 of the Reform Act, 2 Wm. IV. c. 45 (which declared that that Act should not entitle any person to vote for the town of Cambridge in respect of the occupation of any chambers in any of the colleges or halls of the University), was incorporated with the Act of 1867 (30 & 31 Vict. c. 102), by sections 56 and 59 of that Act, and also on the ground that none of the claimants was a lodger within the meaning of the last Act.

Mellish (*Lord* with him) for the appellants.

The *Solicitor-General* (*Cockerell* with him) for the respondent.

The Court held that as each set of chambers was so severed from the rest of the building as to be a house within the meaning of 2 Wm. IV. c. 45, s. 27, the occupiers of them were not lodgers within the meaning of section 4 of the 30 & 31 Vict. c. 102; and they also held that section 78 of 2 Wm. IV. c. 45 was incorporated with the 30 & 31 Vict. c. 102 by sections 56, 59, so that in any way the appellant in each case was not qualified.

Decision affirmed.

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House of Lords. Feb. 23 and June 10. } PARTINGTON *v.* THE ATTORNEY-GENERAL.

Revenue—55 Geo. III. c. 184*—Probate Duty—Accretions by Interest since Death—Two Devolutions of the same Property reduced into Possession on the Second Devolution only—Beneficial Interest devolving on Person Domiciled Abroad.*

Mrs. Shard died intestate in 1819. Her next of kin not appearing, the solicitor to the Treasury took out administration to her estate, which amounted to upwards of 23,000*l.* It afterwards appeared that one Mrs. Isabel Cook was her sole next of kin. Isabel Cook was married to Ellis Cook, and she and her husband were domiciled in the United States of America. Mrs. Cook died in 1825, and her husband died in 1830. Upwards of thirty years after the death of Mrs. Shard, the children of Mr. and Mrs. Cook, through their attorney, Mr. Partington, the plaintiff in error, took proceedings in England to substantiate their claim to her estate, and in 1857 they obtained the certificate of the Court of Chancery that Isabel Cook was her sole next of kin, and Vice-Chancellor KINDERSLEY made an order upon the solicitor to the Treasury to refund the principal moneys constituting Mrs. Shard's estate, with interest at 4 per cent. The accumulation of interest amounted to upwards of 12,000*l.*

Mr. Partington had, for the purposes of the suit, taken out administration for a nominal amount to the estates of Ellis Cook and Elizabeth Cook respectively; and the grant of administration to the estate of Ellis Cook was recited in the letters of administration to the estate of Elizabeth Cook, for the purpose of showing that Mr. Partington, as the representative of the person

beneficially entitled to her estate, was the party properly entitled to such letters of administration.

When, after the order of Vice-Chancellor KINDERSLEY, application was made to affix the proper stamp to the letters of administration, the Commissioners demanded *ad valorem* duty on each of the administrations granted to the estates of Ellis Cook, and also of Elizabeth Cook, and in respect not only of the amount of principal moneys constituting those estates, but also in respect of the accumulated interest thereon. Mr. Partington resisting the demand, the claim was argued before the Court of Exchequer, and in 1862 that Court adjudged that *ad valorem* duty was payable only on the administration to the estate of Elizabeth Cook, but that it was payable in respect of accumulated interest, as well as in respect of the principal moneys.

The Court of Exchequer Chamber in 1864, on error brought, adjudged that the duty was payable on both administrations, and in respect of both principal and accumulated interest. Hence this appeal.

Mr. Cotton and *Mr. W. H. Holl* appeared for the plaintiff in error.

The *Attorney-General* (*Sir R. P. Collier*), *Sir Roundell Palmer*, and *Mr. Crompton Hutton* were for the defendant in error.

Their LORDSHIPS (the LORD CHANCELLOR, and LORD CHELMSFORD, LORD COLONSAY, and LORD CAIRNS) affirmed the judgment of the Court of Exchequer Chamber. But LORD WESTBURY dissented, so far as related to the duty on the letters of administration to the estate of Ellis Cook, on the ground that as he was domiciled abroad, there was only one succession of which English law ought to take cognisance.

Privy Council Cases.

Privy Council. June 14. THE OWNERS OF THE SHIP BETA (APPELLANTS) *v.* TOUSSAINT ROLLANDO (RESPONDENT).

Admiralty—Admiralty Court—Jurisdiction—Personal Injuries—Admiralty Court Act, 1861 (24 *Vict. c.* 10, *s.* 7).

Present, Lord ROMILLY, Sir W. ERLE, Sir J. COLVILE, and Sir J. NAPIER.

This was an appeal from an order of the judge of the High Court of Admiralty of England on a motion made by the respondent to reject the admission of a petition filed by the appellant in objection to the jurisdiction of the Court in a cause of damage instituted in the said Court by the respondent against the ship Beta.

The petition stated that on the morning of September 18, 1866, the steamship or vessel Beta, of which the defendants were the owners, came into collision with a French brig called the Xiste, which was then lying at anchor off Broadstairs on the coast of Kent. The plaintiff in the cause was, at the time of the collision, the mate or one of the seamen of the Xiste, and alleged that he sustained certain bodily injuries in and by reason of the said collision, and that the said collision and injuries were occasioned by the ship Beta, and the negligence of her master and crew in and about the navigation of the said ship. That the plaintiff instituted the cause against the said ship for the recovery of damage in respect of the said injuries, and the defendants submitted that the High Court of Admiralty had no jurisdiction to entertain the cause.

The respondent moved the Court below to reject the admission of the petition.

Upon this motion the question arose whether, admitting the truth of the statements contained in the petition, the High Court of Admiralty had jurisdiction to entertain the cause.

On July 28, 1868, the motion came on for hearing, and the learned judge of the Court below held that the Court had jurisdiction to entertain the cause, and rejected the petition of the appellants, and condemned the appellants in the costs, but gave them leave to appeal to Her Majesty's Court of Appeal.

Aspinall and *Clarkson* for the appellants.

Butt and *Pritchard*, for the respondent, were not heard.

Lord ROMILLY: Their LORDSHIPS are of opinion that the judgment of the learned judge of the High Court of Admiralty must be affirmed. The words of the section of the Admiralty Court Act, 1861, appear expressly to include a remedy for any damage done by any ship. The decision in the Sylph (2 Adm. Rep. 24) has never been appealed from.

Courts of Equity.

LORDS JUSTICES. June 11. *Re* WILKINSON'S TRUST.

Wills Act, *s.* 27—*Execution of General Power over a Trust Fund by Bequest of Personalty.*

This was an appeal from an order of STUART, V.C., by which His HONOUR decided that where a testatrix gave several pecuniary legacies, and afterwards bequeathed all the residue of her personal estate, the will operated as an execution of a general power of appointment which the testatrix had over a trust fund; so that the fund became applicable for payment of the legacies, and, subject thereto, went to the residuary legatee. From this decision the appeal was brought by persons who were entitled in default of appointment, and also under the residuary bequest.

Mr. Dickinson and *Mr. Miller* for the appellants.

Mr. Greene, Mr. T. Hughes, and *Mr. Marten* appeared in support of the VICE-CHANCELLOR'S order.

Their LORDSHIPS considered that the will, by giving pecuniary legacies and then dealing with the residue of personalty, in effect constituted a bequest of the personal estate of the testatrix within the meaning of section 27 of the Wills Act. The appeal was therefore dismissed with costs.

LORDS JUSTICES. June 8. } CATT *v.* TOURLE.

Covenant—When Binding on Land—Brewers' Covenants entered into by Owner in Fee—Demurrer.

This was an appeal from the decision of STUART, V.C., noted *antè*, p. 95.

Mr. Greene and *Mr. Townsend* for the appellant.

Mr. Karslake and *Mr. Ayrton* for the respondent.

Their LORDSHIPS dismissed the appeal with costs.

LORD ROMILLY, M.R. June 3, 4. } *In re* CHINA STEAM SHIP CO. DAWE'S CASE.

Company—Call—When Owing.

In this case a call was made on Nov. 27, 1866, payable on Dec. 20. At the former date Mr. Dawe was a member of the company, but on Dec. 17 his shares were declared forfeited for nonpayment of a previous call. The articles of association provided that the holder of forfeited shares should be liable to pay all sums of money 'owing at the time of the forfeiture.' The question was whether Mr. Dawe was liable to pay this call.

Mr. Roxburgh and *Mr. Wickens*, for the official liquidators, argued that he was liable.

Mr. Jessel, for Mr. Dawe, urged that it was not owing at the time of the forfeiture, since it was not made payable till afterwards.

The MASTER OF THE ROLLS held that he did owe the call at the time of the forfeiture. The call was owing and due at the time when it was made, although it could not be compulsorily enforced till Dec. 20.

LORD ROMILLY, M.R. June 9. } ZAMBACO *v.* CARSAVETTI.

Practice—Exceptions to Answer—Form of Exception.

In an administration suit one of the interrogatories asked for an account of the personal estate of the testator in the cause, in the usual form of detailed questions as to various particulars. Among other things it asked who were the persons in whose names the personal estate had been invested, and required capital to be distinguished from income.

The answer set out most of the particulars required in a schedule, but did not distinguish between capital and income, nor show in whose names the investments had been made.

The plaintiff excepted to the answer to this interrogatory generally, without specifying in what particulars it was deficient.

Mr. Jessel and *Mr. Chapman Barber* were for the plaintiff.

Sir Richard Baggallay and *Mr. Marten*, for the defendant, argued that the interrogatory contained several questions, and that the exception was wrong in form for not stating which of them was unanswered. They cited *Higginson* v. *Blockley*, 25 Law J. Rep. (N.S.) Chanc. 74.

The MASTER OF THE ROLLS held that the questions included in the interrogatory were not, as in the case cited, distinct, but were all incidental to one main inquiry, and his LORDSHIP allowed the exception.

LORD ROMILLY, M.R. June 11. } ROEBUCK *v.* CHAVEBET.

Partition Suit—Sale of Part and Partition of Remainder.

In a partition suit there was evidence that it would be for the benefit of the parties that part of the property should be sold and the remainder retained.

Mr. Wickens, for the plaintiff, submitted whether, under the 31 & 32 Vict. c. 40, the Court had power to direct a sale of part of the property and a partition of the rest.

Mr. Davey appeared for the defendants.

The MASTER OF THE ROLLS made the order.

LORD ROMILLY, M.R. June 8, 12. } MALTBY *v.* WARE.

Injunction—Light and Air—Acquiescence.

The plaintiff asked for a mandatory injunction to compel the defendant to pull down a wall which darkened the plaintiff's rooms. One defence was that the defendant had explained the mode in which he intended to build, assuring the plaintiff that his light would not be injured. The plaintiff, relying on this assurance, acquiesced.

Mr. Jessel and *Mr. Key* were for the plaintiff.

Mr. Southgate and *Mr. Chitty*, for the defendant, argued that the plaintiff was bound by his acquiescence.

June 12.—The MASTER OF THE ROLLS held that he was not precluded from asserting his right. He had relied on the assurance of the defendant, which turned out to be unfounded.

STUART, V.C. June 7. } BEAVAN *v.* COOK.

Mortgagor and Mortgagees—Bill for Redemption—Foreclosure or Sale—Priorities—Interrogatories—Answer—Insufficiency—Exceptions.

The bill in this suit prayed that an account might be taken of what was due to the plaintiff, and the defendant Robert Cook, under certain securities hereinafter mentioned, that their priorities might be ascertained, and that the usual decree for redemption and foreclosure, or for a sale, might be made.

It appeared that the defendant Horace Charles Beavan was, under the will of his father, who died in 1852, entitled to a reversionary interest in a sum of stock, in Court, expectant on the death of his mother, who was still living. The defendant R. Cook advanced to the defendant H. C. Beavan several sums of money, which were secured to him by mortgages of that defendant's reversionary interest. These mortgages were nine in number: the first of them was dated April 13, 1864, and the last May 11, 1866. On March 20, 1866, the plaintiff, who was not then aware of the advances already made to H. C. Beavan by the defendant R. Cook, lent the defendant H. C. Beavan a sum of 2,559*l.*, on his undertaking in writing to execute a mortgage of his reversionary interest to secure the same, and obtained a stop order on the fund in Court. The plaintiff by his bill did not seek in

any way to cut down the amount of the securities of the defendant Cook on the ground of any irregularity, but prayed simply the relief above stated. The plaintiff, however, filed interrogatories to his bill, by which he asked the defendant Robert Cook to set forth (*inter alia*) the rates of interest for which the money had been advanced by him on his securities to H. C. Beavan, and the amount of the money paid as a consideration for the same. He also asked several questions as to notice, and other matters not stated in the bill. In reply to those interrogatories, the defendant Robert Cook by his answer replied to the matters not specifically mentioned in the bill, and stated the mortgages made to him by his co-defendant, with the dates of them, and the amounts of the principal money for which they were respectively executed (the total being for a sum of 1,274*l.*; but he did not state the rate of interest payable on account of the loans, or what were the amounts actually advanced on the securities. Under those circumstances the plaintiff excepted to the answer for insufficiency.

Mr. Dickinson and *Mr. E. Cutler*, in support of the exceptions, contended that the defendant Robert Cook ought, if he answered the interrogatories at all, to have answered them fully in the matters complained of.

Mr. Greene and *Mr. F. H. Daly*, for the defendant Robert Cook, insisted that he was not bound to answer questions the replies to which formed, in fact, the very things to be inquired into and ascertained under the decree sought by the bill. It was sufficient if he admitted that there had been such mortgages as were inquired after.

STUART, V.C., said the exceptions for insufficiency, on account of the want of an answer to the interrogatories as to the amount of the interest on the mortgages, and the sums actually advanced by Cook to H. C. Beavan, must be allowed. The plaintiff in this case, who stood in a similar relation to the defendant H. C. Beavan with that filled by Cook, was clearly entitled, before decree, to know from Cook all that he could tell him about the mortgages given by H. C. Beavan to him (Cook). The exceptions must be allowed generally, and the plaintiff might have leave to amend his bill (if necessary).

STUART, V.C. June 9. } WOOTTON *v.* WOOTTON.

Marriage with a Deceased Brother's Widow—Settlement in Consideration of, Set Aside.

The plaintiff in this suit had gone through the ceremony of a marriage with the widow of his brother. In contemplation of that, a settlement of certain property belonging to the lady had been then executed. She had had two children by her marriage with the plaintiff's brother, but they were now dead; and she was upwards of fifty-three years of age. The object of this suit was to have the settlement set aside, on the ground of the illegality of the consideration for it. It was agreed that all the lady's property was to be restored to her, and that the parties were to be placed in as nearly as possible the same position as that in which they originally stood.

Mr. Davey appeared for the plaintiff,

Mr. Rendall for the lady, and

Mr. Wickins for the trustees of the settlement.

STUART, V.C., made a decree according to the prayer of the bill, and ordered the plaintiff to pay the costs of the suit.

MALINS, V.C. June 10. } SUTCLIFFE *v.* HOWARD.

Will—Gift to Three for their respective Lives—Tenancy in Common.

John Howard, by a codicil executed shortly before his death in 1848, devised certain hereditaments in trust to apply the rents and profits for the benefit of his two brothers, James and Samuel, and his married sister Lucy, 'during their respective lives, and subject thereto in trust for their respective children.'

The question was whether the gift created a joint tenancy or a tenancy in common.

Mr. Dunning for the trustees.

Mr. Glasse and *Mr. Humphrey*, for Samuel Howard, who survived James and Lucy, claimed a life interest in the whole, and submitted that at his death the property would be divisible between all the children *per capita* and not *per stirpes*.

Mr. Nalder, who appeared for the children of the deceased devisees, was not called upon.

MALINS, V.C., held that the gift to the three 'for their respective lives' created a tenancy in common, the intention being that each should take a share for his or her life; and 'subject thereto'—that is, subject to the life interest already given to each—the children of each were to take the share of their deceased parent.

MALINS, V.C. June 11. } WESTBROOK *v.* MCKIE.

Will—Charity—Failure of Object of Bequest—Cy-près.

Robert Briggs, who died in 1841, by his will gave 1,000*l.* upon certain trusts to aid in the erection and endowment of a church in Antigua for the performance of Presbyterian service according to the form of the Established Church of Scotland. The gift was conditioned upon the erection of the church and the induction of a minister within eight years after the testator's death. In 1842 the church was built, and a minister of the Established Church of Scotland appointed; he, however, retired in 1843, and no other minister was appointed till 1846; since that date the service had been performed by ministers of the Free Kirk of Scotland. There was no other Scotch congregation of any sort on the island. The trustees of the church claimed the legacy; their claim was resisted by those interested in the testator's estate, on the ground that the object had failed, as the ministry of the Church was not that of the Established Church of Scotland, and that the doctrine of *cy-près* could not be applied to the case so as, failing the Established Church, to bring the Free Kirk within the terms of the bequest.

Mr. Wickens for the Attorney-General.

Mr. Vaughan Hawkins for the trustees of the church.

Mr. Glasse, *Mr. Bevir*, and *Mr. G. O. Edwards* for various parties in the opposite interest.

The VICE-CHANCELLOR said he was not sure that it was necessary to have recourse to the *cy-près* doctrine; the will said, 'for the performance of the Presbyterian service,' and the Established Church and Free Kirk were equally Presbyterian. But, if it were necessary, he thought the doctrine would apply in this case, as in *Attorney-General* v. *Bunce*, 37 Law J. Rep. (N.S.) Chanc. 697, where he held that a bequest to Presbyterians in Devizes could, failing the existence of Presbyterians in that town, be taken by a Baptist congregation.

MALINS, V.C.
April 26, 27, 28.
June 12.
} PRONJE *v.* MATTHEWS.

French Settlement, Construction of—Wife's Earnings, Power of Wife to Dispose of—Discretion of Court.

In 1829 the plaintiff, Eugene Pronje, a Frenchman, married Harriet Shean; and a settlement was executed according to the French form, in which, amongst other provisions as to community of goods acquired during the marriage, &c., it was agreed as follows: 'the future consorts make one with another an irrevocable donation *inter vivos*, whereby all their realty and personalty shall belong to the one first dying at the day of his or her decease.'

The wife, after giving birth to a child in 1832, which was registered under the name of Leon Pronje, ultimately deserted her husband, and lived for many years as 'Madame Cheveot' in India, where by successful trading she acquired a fortune of about 10,000*l.*

In 1856, her son Leon Pronje died, leaving an illegitimate child (the infant defendant in the suit), whom Madame Pronje thenceforth adopted as her grandchild, and maintained with the utmost care and affection. Shortly before her death (which took place in 1865) she remitted a sum of 2,800*l.* to Messrs. Matthews in London to be held by them in trust for the benefit of this child. Upon her death the plaintiff immediately possessed himself of the remainder of his wife's property, and filed the present bill to set aside the settlement of the 2,800*l.*, as being contrary to the above-stated provisions of their marriage settlement.

An immense amount of evidence was produced upon the facts of the case, and particularly with reference to the construction to be placed, under the French law, upon the terms of the marriage contract.

Mr. Glasse and *Mr. Graham Hastings* for the plaintiff.
Mr. Cotton and *Mr. Langley* for the infant defendant.
Sir R. Palmer and *Mr. Speed* for the trustees.

MALINS, V.C., held that the result of the various opinions given upon the case by the French *avocats* was to show that, notwithstanding the provisions of the marriage settlement, the wife had free power, 'within reasonable limits,' to dispose of property acquired by herself during the coverture, and that it was for the Court to determine what was or was not a 'reasonable limit,' having regard to all the circumstances of each case. In his opinion the provision made by Madame Pronje for her grandchild was both reasonable and right; the plaintiff's claim was not well founded either in law or in natural justice; and the bill must be dismissed with costs.

JAMES, V.C.
May 25, 26.
June 4.
} PARKES *v.* STEVENS.

Issues of Fact—Patent—Specification—Combination.

The defendant was employed to place certain globular lamps in Palace Yard, which the plaintiff alleged to be of such a kind as to constitute an infringement of his patent. On the motion for an injunction it was arranged that the following issues should be tried by the Court itself, without a jury (Chanc. Amendment Act, 1858, s. 5):—

1. As to the novelty of the alleged invention, the subject of the patent.
2. As to its utility.
3. Whether it was or was not a proper subject for a patent.
4. Whether the specification was sufficient.
5. Whether there had been an infringement by the plaintiff.

The specification described the invention as relating to the construction of lamps of a class forming the subject of a former patent granted to the plaintiff, 'the great object of the improvements being to produce a glazed lamp, the frame of which shall throw little or no shadow, and yet at the same time possess the requisite strength and also facilities for lighting and cleaning the lamp.' It concluded as follows: 'I declare that what I claim as my invention is the arrangement and combination of parts hereinbefore described and represented in the drawings annexed, in the manufacture of railway-station and other gas lamps.' The defendant's lamp resembled the plaintiff's in being globular and divided into segments, one of which opened as a door (but in the lower, whereas the plaintiff's door was in the upper, hemisphere): the door was originally made to turn upon a hinge, but the defendant substituted a sliding door at the request of his employer, Mr. Barry, in imitation, as was alleged, of a lamp of the plaintiff's, which had been sent to Mr. Barry for inspection. The defendant's lamp was fixed on a post, whereas the plaintiff's was made for suspension, an important part of the invention being the contrivance for making one of the suspending rods serve as a gas duct.

Mr. Webster, *Mr. Kay*, and *Mr. Everitt* for the plaintiff.

Mr. Amphlett and *Mr. Bagshawe* for the defendant.

JAMES, V.C., was of opinion that the plaintiff had produced an article of great neatness and elegance of form, by which the objects put forward in the specification were effectually attained. As to the sufficiency of description, he entirely concurred in the doctrine that the parts claimed as new must be expressly distinguished, and not merely interwoven with a general description of the machine (*e.g.* it would not do to give the machinery of a whole clock, including casually a compensation pendulum); but in this case the plaintiff was entitled to have the two specifications read together, and, so read, a lamp maker would have no difficulty in understanding what was claimed. On the first four issues, therefore, he was in favour of the plaintiff, but as to the last (though there was no ground for saying that the use of part of a patented invention in a different combination would not be an infringement), he thought there could be no patent right in the mere substitution of a sliding door for a hinge, and on that point, therefore, his verdict would be for the defendant.

JAMES, V.C.
June 3, 4.
} OGLE *v.* KNIPE.

Will—Construction—Bequest of 'Money and Securities for Money'—Bank Stock.

Special case. Thomasin Ogle, by her will dated May 1857, bequeathed to trustees all her 'money and securities for money of every description' on trust for her sisters for life, with remainder to her nephews; and she bequeathed her residuary personal estate to her sisters absolutely. One of the questions raised by this case was whether a sum of 3,025*l.* Bank stock belonging to the testatrix at her death would pass under the words 'securities for money.'

Mr. Amphlett and *Mr. Chitty* for plaintiffs.

Mr. Everitt, Mr. Nalder, and *Mr. Babington* for the several defendants.

James, V.C., held that the Bank stock did not pass under the above-mentioned words.

James, V.C. June 7. } Jewis *v.* Lawrence. Lawrence *v.* Lawrence.

Legacies to Two Executors—Unequal Amount—Whether Gift Conditional upon Acceptance of Office.

The testator in this suit by his will bequeathed to William Lawrence, 'one of my trustees and executors hereinafter named,' a leasehold house, subject to an annuity; and he bequeathed to J. T. Paul, 'one of my trustees and executors hereinafter named,' 100*l.* He bequeathed his residuary personal estate to Lawrence and Paul, upon certain trusts, and appointed them his executors. Testator died in June, 1867. Lawrence proved his will in August, 1867. Paul died in September, 1867, without having proved or having disclaimed or renounced probate of the will. Under these circumstances a question arose whether Paul was entitled to his legacy.

Mr. A. E. Miller for the plaintiff Jewis.

Mr. Bristowe for Lawrence.

Mr. Kay and *Mr. B. B. Rogers* for the residuary legatees.

Mr. Brooksbank and *Mr. Crossley* for other parties.

James, V.C., said that where there was a gift to one described as the testator's executor, a presumption usually arose that the gift was conditional upon the acceptance of the office. But where, as here, unequal bequests were made to two persons named as executors, no such presumption arose.

James, V.C. June 11, 12. } Pugh *v.* Drew.

Executory Trust—Settlement of Freeholds—Reference to Trusts of Leaseholds—Words of Limitation wanting—Estate in Fee.

By indenture of settlement, dated March 7, 1818, it was declared that certain leasehold premises, which had previously been assigned to trustees by William B. Pugh, the settlor, should be held by them upon trust for William R. Pugh, Jane R. Pugh, and Margaret R. Browne, for their respective lives, with remainders to their respective children *per stirpes,* and as to the share of any one of them who should leave no such child as should attain twenty-one, or marry, in trust for such of them, William R. Pugh, Jane R. Pugh, and Margaret R. Browne, as should be living at the end, and failure of the trusts aforesaid, share and share alike. In January 1819 freehold hereditaments were conveyed by the said William B. Pugh to the same trustees in fee; and by indenture, dated January 25, 1869, to which the said William B. Pugh and the said trustees were parties, it was declared that the trustees, their heirs and assigns, should stand possessed of the said hereditaments and premises 'upon such and the same trusts, and for such and the same ends, intents, and purposes, and subject to such and the same powers, provisos, and declarations as in the said indenture of March 1818 were expressed, declared, and contained' of the premises therein mentioned,' or as near thereto as the difference of the respective estates of the said trustees and their respective heirs, executors, and administrators therein respectively would admit,' to the intent that the same hereditaments and premises might be sold, conveyed, and assigned, and the produce thereof paid and applied in the same manner as by the said indenture of March 7, 1818, was declared concerning the premises therein particularly mentioned.

Jane R. Pugh died in 1862 unmarried and intestate. The settlor, William B. Pugh, had died in March 1841, having devised all his freehold and leasehold estates to John Pugh, his heir at law. This suit was instituted by William R. Pugh and Margaret R. Browne against John Pugh and others, to determine their rights under the settlement.

Mr. Fry, for the plaintiffs, contended that on the death of Jane R. Pugh one equal third part of the freeholds as well as of the leaseholds passed to them absolutely as tenants in common.

Mr. C. T. Simpson, for John Pugh, contended that the words of reference in the deed of 1819 gave only a life estate to the plaintiffs, and John Pugh was entitled in remainder as the settlor's heir and devisee.

Mr. Tooke for the trustees.

Mr. J. Simmonds for other defendants.

James, V.C., held that upon the death of Jane R. Pugh her share in the freeholds passed to the plaintiffs in fee.

Courts of Common Law.

Queen's Bench. June 7. } Harris and Another *v.* Quine.

Conflict of Laws—Statute of Limitations—Foreign Judgment, how far a Bar to an Action in this Country—Decision on the Merits—Lex Fori—Attorney's Bill of Costs.

This was an action on an attorney's bill of costs contracted in the Isle of Man while both parties were resident there. It appeared that the plaintiffs conducted a suit in the Consistorial Court of the island on behalf of the defendant, and this suit was decided against him in April, 1861. In September of the same year the defendant was instructed by the plaintiffs to take proceedings in the Court of Appeal, in order that this decision might be reversed. In October, 1862, the partnership between the plaintiffs was dissolved, and the proceedings were thenceforth continued by one of them. The defences raised by the pleadings were—first, the English Statute of Limitations; secondly, that the plaintiffs had taken proceedings in the Isle of Man in respect of the same cause of action, and that judgment had been given against them on the ground that more than three years

had elapsed since the cause of action arose, so that it was barred by the Manx Statute of Limitations.

R. G. Williams, for the plaintiffs, contended, first, that the judgment in the Manx Court not being on the merits was no bar to an action in this country; secondly, that the appellate proceedings in the Isle of Man must be regarded as a continuation of the original suit.

Baylis, for the defendant, argued that the plaintiffs, having elected to resort to the Manx Court, were concluded by its decision; secondly, that the Statute of Limitations began to run from the termination of the original suit.

The COURT (COCKBURN, C.J., BLACKBURN, J., LUSH, J., and HAYES, J.) gave judgment for the plaintiffs on both points. As the Manx statute did not extinguish the cause of action, but only barred the remedy, it was part of the *lex fori*, which did not apply to the present proceedings. The Manx judgment was not a decision upon the merits, as it was founded upon the local law of prescription, and did not prevent an action in this country. Lastly, although the plaintiffs might have been at liberty to sue for their costs at the termination of the original suit, yet the instructions to commence the appeal were a continuation of this suit, so that the English Statute of Limitations did not begin to run till the dissolution of partnership in October 1862, and the action was therefore not barred.

Judgment for the plaintiffs.

Queen's Bench. June 9. } BERRIDGE *v.* FITZGERALD.

Bill of Exchange—Notice of Dishonour—Place of Business.

In this case the defendant was sued as the indorser of a bill, and the question was whether he had received sufficient notice of the dishonour of the bill, or whether the want of notice was excused by the holder's ignorance of the place of residence of the defendant. It appeared that the bill was accepted by the manager of the Industrial Loan and Interest Company (Limited) in their behalf, and was indorsed by the defendant and another person, both of them being directors of the company. The bill was accepted and indorsed at the office of the company, which the indorsers were in the habit of attending. In July 1868 it became due and was dishonoured, the company being insolvent. A notice of dishonour was sent to the defendant, addressed to him at the office of the company, but as he had ceased to attend the office it did not reach him until some time afterwards. The plaintiff also made inquiries as to the defendant's private residence of other directors of the company, and at an office with which the company had had dealings, but not at the office of the company itself.

Warton for the plaintiff.

Hodgson for the defendant.

The COURT (COCKBURN, C.J., BLACKBURN, J., LUSH, J., and HAYES, J.) gave judgment for the plaintiff. If nothing more had appeared in the case than that the plaintiff was ignorant of the indorser's private residence, the Court were inclined to think that the plaintiff could not be taken to have used due diligence in searching for the address. But looking at the facts, that the bill was indorsed at the company's office, that the plaintiff knew nothing of the defendant's address, and that the defendant was described as director on the bill, the plaintiff was justified in thinking that he was, as it were, domiciled at the office, and that he intended that the office should be the place where any notice respecting the bill should be sent to him.

Judgment for the plaintiff.

Queen's Bench. June 9. } *Ex parte* WASON.

Conspiracy—Speeches Delivered in the Houses of Parliament—Information—Discretion of Magistrate—22 & 23 Vict. c. 17.

This was an application by Mr. Rigby Wason for a rule calling upon Mr. Tyrwhitt, the Marlborough Street police magistrate, to show cause why a mandamus should not issue compelling him to take recognisances upon an information preferred by Mr. Wason against Earl Russell, Lord Chelmsford, and the Lord Chief Baron. The information stated that the applicant had presented a petition to the House of Lords against the Lord Chief Baron, and that Earl Russell, Lord Chelmsford, and the Lord Chief Baron, in order to prevent the course of justice, &c., made statements which they knew were not true, in order to prevent the prayer of the petition from being granted, and that they made these statements after conferring together. The information further stated that Earl Russell, Lord Chelmsford, and the Lord Chief Baron agreed to deceive the House of Lords, by representing that the statements in the applicant's petition were false.

By 22 & 23 Vict. c. 17, certain offences, including conspiracy, are enumerated, for which no indictment is to be preferred without previous authorisation, and by section 2, where any charge or complaint shall be made before any one or more of Her Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit 'or to bail the person charged with such offence,' the justice is required to take the recognisance of the prosecutor, and, in case the prosecutor desires it, to transmit it with the information and deposition to the Court in which the indictment ought to be preferred.

The COURT (COCKBURN, C.J., BLACKBURN, J., LUSH, J., and HAYES, J.), while agreeing that if the information had charged an indictable offence, the magistrate would have had no discretion, and would have been bound to take the recognisances, refused the rule on the ground that the offence charged was the delivery of speeches in one of the Houses of Parliament, which could not be the subject of an indictment. The same privilege would extend to a conference previous to the delivery of any such speeches, which was highly necessary to ensure the freedom of debate.

Rule refused.

Common Pleas. June 11. } MACDONALD *v.* THOMPSON.

Bankruptcy—Suspension of Proceedings in Bankruptcy—24 & 25 Vict. c. 134, s. 110—Composition—Rights of Execution Creditor—Property of Bankrupt.

Defendant was a judgment creditor of one Pope, who afterwards and before satisfaction of such judgment was adjudicated bankrupt, and the plaintiff was appointed the creditors' assignee. Subsequently, viz. January 11 last, a meeting of the creditors was held pursuant to the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), when the majority resolved that no further proceedings

should be taken in bankruptcy, on the ground that it was advisable to accept an offer by the bankrupt to take all his estate, and to pay all his creditors a composition of 2*s.* 6*d.* in the pound, payable on February 11 then next. This resolution was confirmed at an adjourned meeting held on January 25 last, pursuant to section 110 of the Bankruptcy Act, 1861, and on the same day the messenger was ordered to withdraw from the possession of the bankrupt's goods, but the bankrupt himself never had actual possession of them, and they were still retained by the plaintiff. The defendant, considering, however, that the effect of what had been done was to vest the property of the goods in the bankrupt, reissued execution on his judgment, under which he seized these goods in execution on January 26. Upon an interpleader issue, the question was whether these goods were then the property of the plaintiff as against the defendant. At the trial before the Judge of the Passage Court of Liverpool, a verdict was entered for the plaintiff, and the question now came before this Court on a rule *nisi* to set aside such verdict, and to enter it for the defendant on the ground of misdirection of the judge in holding that the goods were the plaintiff's as against the defendant.

Charles Russell and *Foard* showed cause.

Leofric Temple in support of the rule.

The COURT were of opinion that the property remained in the plaintiff as such assignee, notwithstanding what had occurred (whether the resolution of the creditors was within section 110 or not), as there had not been done anything which set aside the bankruptcy, or divested the plaintiff of what had been vested in him by reason of the adjudication in bankruptcy.

Rule discharged.

Probate and Matrimonial Causes.

Divorce and Matrimonial Causes. June 8. } NOBLE *v.* NOBLE AND GODMAN.

Husband's Petition—Marriage of Petitioner a Fortnight after Decree Nisi—Decree made Absolute—Discretion —20 & 21 Vict. c. 85, s. 31.

The petitioner (the husband) obtained a decree *nisi* for dissolution of his marriage, on November 28, 1868. A fortnight afterwards he went through the ceremony of marriage with another woman, and cohabited with her. He conducted his case in person, and believed that the first marriage had been dissolved by the decree *nisi*. The Queen's Proctor having filed affidavits setting forth the facts,

The *Attorney-General* (with him *C. A. Middleton*) now showed cause against the decree *nisi* being made absolute.

Inderwick, for the petitioner, submitted that the case was one for the exercise of the discretion of the Court under section 31 of the Act.

LORD PENZANCE.—In any view of the case, the Queen's Proctor has done good service in bringing this matter to the attention of the Court. The ground on which the petitioner is said to have acted is the want of knowledge of the effect of a decree *nisi*; and the greater the publicity given to proceedings of this character, the less likely is it that occurrences of the same kind will again come before the Court. The question now before the Court to consider is whether it will exercise the discretion vested in it by section 31, and grant the petitioner his divorce notwithstanding his adultery. I am prepared to give credence to what the petitioner says. I believe that he did think he was released by law from the obligation of the first marriage, and that it was that which induced him to contract this second marriage, and to enter into cohabitation which was in truth adulterous. It is said that ignorance of law does not excuse a person in a criminal Court. That is quite true, but this Court has a discretion vested in it; and, being satisfied that in contracting this second marriage the petitioner did not intend to commit adultery, I think it ought not to stand in the way of his decree.

The decree nisi was accordingly made absolute.

Divorce and Matrimonial Causes. June 4. } DITCHFIELD *v.* DITCHFIELD.

Wife's Petition for Dissolution of Marriage—Previous Suit for Decree of Nullity on the ground of Impotency dismissed—Costs.

This was the wife's petition for dissolution of marriage on the ground of adultery, coupled with cruelty and desertion. The respondent did not appear.

The marriage took place in 1854, and in 1864 the petitioner instituted a suit for a decree of nullity of marriage on the ground of impotency, which was dismissed.

The allegations of adultery and cruelty having now been sustained, the Court granted a decree *nisi*, and condemned the respondent in costs.

Searle, for the respondent, submitted that he ought not to be condemned in the costs of both suits. He had already paid the petitioner's costs in the suit for nullity.

Dr. Spinks (*Inderwick* with him), for the petitioner, *contra*.

LORD PENZANCE.—In this suit the respondent, by his misconduct, has rendered himself liable to the wife's full costs, but I think he ought to have credit for any sum paid by him on account of the wife's costs in the suit for nullity in which she failed.

Order accordingly.

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PECHELL *v.* HILDERLEY—*Will and Codicil not duly Executed: Second Codicil Endorsed on Back of Will, and Executed in accordance with the Forms of, although not valid by, the Law of the Country where made: Confirmation: Foreign Law:* 24 *&* 25 *Vict. c.* 114 . . 176

Courts of Equity.

LORDS JUSTICES. June 22. } *In re* LONDON MARINE INSURANCE ASSOCIATION. *Ex parte* SMITH.

Mutual Assurance Society—Unstamped Policy.

This was an appeal from the decision of Vice-Chancellor JAMES, noted *antè*, p. 106.

Mr. Eddis and *Mr. Lindley* were for the appellant, the official liquidator.

Mr. Macnaghten, for Mr. Smith, was not called upon.

Their LORDSHIPS dismissed the appeal, with costs.

STUART, V.C. June 9. } SHARP *v.* DE ST. SAUVEUR.

Real Estate—Conveyance of, upon Trust for Sale, Exchange, or Partition—Partition—Devise of Estate as 'Landed Property' to an Alien—Personalty—Conversion.

The bill in this suit prayed that the trusts of an indenture of March 10, 1862, so far as they related to certain hereditaments allotted by an agreement of April 8, 1862, to Matilda Susan Baronne de St. Sauveur, might be executed, and the rights and interests of all parties thereunder ascertained by the Court.

Eliza Loveday, widow, died in November 1861, having by her will, dated March 14, 1859, devised all her real estates at Ealing, in Middlesex, to the defendants, W. L. Loveday and her daughter, the Baronne de St. Sauveur, equally, as tenants in common. The property at Ealing was partly freehold and partly copyhold. By the indenture of March 10, 1862, all the property was duly conveyed to the plaintiff as trustee, upon trust for sale, exchange, and partition thereof, as in the indenture mentioned; and, if sold, the moneys arising therefrom were to be held by the trustee, upon trust for W. L. Loveday and the Baronne equally, her share to be for her separate use, 'so long as the land, hereditaments, and premises, or any lands or hereditaments which should be taken in exchange as therein aforesaid, should remain unsold.' The trustee was to hold the rents and profits thereof (as to the moiety of the Baronne), 'in

trust for such persons and person, and for such interests and purposes as she should by any deed or deeds, with or without any power of revocation and new appointment, or by her will, from time to time, notwithstanding her coverture, direct or appoint; and in default of, and until any such direction or appointment in trust for her, her heirs and assigns, for her sole and separate use and benefit.

By an agreement dated April 8, 1862, and made between W. L. Loveday, of the one part, and the Baronne and her husband, of the other part, certain of the unsold hereditaments comprised in and subject to the trusts of the last-mentioned indenture were duly allotted to the Baronne, not upon the trusts of such last-mentioned indenture. The allotted property never was sold. The Baronne died in 1866, having by her will bequeathed to her husband all her movables of every description and funded property absolutely, and having made the following disposition in his favour:—

'I leave also to my husband, for and during his life only, all my landed property situated at Ealing, in the county of Middlesex, in England. After the death of my husband, the aforesaid landed property I give and bequeath to my brother, W. L. Loveday, and to my sister, Mrs. E. de Ghens, equally, with charge to them on the rent for an annuity of 50*l.* to my sister-in-law, Mrs. H. Loveday, and her daughter Julia, revertible to the survivor during her life only.'

The Baronne de St. Sauveur died without issue, and her husband was an alien.

The questions, therefore, were:—(1) Whether the trusts for sale of the Ealing property, under the indenture of March 10, 1862, ought now to be executed, and the income of the purchase-moneys paid to the Baron for his life; or (2) whether the said landed property should remain unsold in that case; (3) to whom the rents and profits thereof ought to be paid, during the life of the Baron—whether he, or Her Majesty, or the co-heirs at law, or the customary co-heirs of the Baronne, was or were entitled to such rents and profits?

The answers to those questions depended on that to this further one; whether the Baronne had or had not, by her will, elected to treat the property at Ealing as real estate, and not personalty?

Mr. E. K. Karslake and *Mr. W. Cooper* appeared for the plaintiff in the suit.

Mr. Joshua Williams and *Mr. M. Cookson*, for the Baron, contended that the original trusts for sale of the property, whereby it was converted into personalty, still subsisted as to it; that the Baronne must be taken to have known the effect of those trusts; and that her husband, being an alien, could not hold land in England. If that were not so, and if her will operated as an election to treat the unsold property as real estate, her manifest general intention in her husband's favour would be defeated; whereas, to hold that the original trusts for sale still governed the property would be to give effect to her wishes, and at the same time to observe the strict rules of this Court.

Mr. Greene and *Mr. G. T. Edwards* appeared for the heirs-at-law.

Mr. Hardy and *Mr. J. N. Higgins* for the customary heirs of the Baronne. They contended that she had by her will clearly treated the property, which she knew to be unsold land, as land; and it must now, therefore, be regarded as such.

Mr. Wickens was for the Attorney-General.

Stuart, V.C., was of opinion that, upon the whole of the case—having regard to all the instruments to be construed, and the effect of them, to the knowledge of the facts that must be imputed to the Baronne, and to the consideration that her express intention to benefit her husband must be defeated if the property was to be treated as land—there must be a declaration that, in equity, the unsold landed property of the Baronne at Ealing was personal estate; that there must also be a decree for the immediate sale of the property, for the due investment of the purchase-money, and for the payment of the income of the moiety belonging to the Baronne to her husband for his life.

James, V.C. May 28, 31, June 1, 8. } Topham *v.* The Duke of Portland.

Void Appointment—Fraud on the Power—New Appointment to Same Person.

In 1864 the House of Lords, affirming the decree of the Lords Justices (1 D. J. & S. 517, and 32 Law J. Rep. Chanc. 257), declared that certain appointments made by the Duke of Portland, whereby the income of 52,000*l.* Consols and an annuity of 2,720*l.* were in form given to one of his sisters, Lady Harriet Bentinck, for her own use absolutely, but on an understanding that she was to allow one moiety thereof to accumulate, subject to some future arrangement, was void as being a fraud on the power, but varied the decree of the Court below by adding the words 'without prejudice to any question as to any future exercise of the power of appointment,' while they refused to express any opinion whether any such future exercise of the power could be permitted (11 H. L. 32).

By deed-poll of July 6, 1864, after reciting the previous appointments and the decree aforesaid, the Duke of Portland irrevocably appointed that the income of the first-mentioned settled fund should thenceforth be paid to Lady Harriet, 'her executors, administrators, and assigns, for her and their own absolute use and benefit, in exclusion of the said Lady Mary Elizabeth Topham, her executors, administrators, and assigns;' and by another deed-poll of the same date he made a similar appointment of the annuity of 2,720*l.* On the same day an order was sent to Messrs. Drummond, the bankers, through whom the income of the trust-funds was received, cancelling all existing orders relating to the account marked 'S.,' to which one moiety of the dividends and annuity had hitherto been carried, and directing the whole amount to be paid in future to the account of Lady Harriet. The only notice given to Lady Harriet was by a letter from Mr. Bailey, the family solicitor, through whom the previous arrangement had been carried out, simply informing her of what had been done, without any intimation as to the use she was expected to make of the money. The Duke by his answer stated that he had not, when he made the last-mentioned appointments, 'any opinion, hope, or expectation' as to the manner in which she would think proper to apply it.

Sir R. Palmer, *Mr. C. Hall*, and *Mr. Rowcliffe*, for the plaintiff, asked that the appointments might be declared void as against the plaintiff, on the ground that nothing had been done to remove the moral influence which was known to have been hitherto operating upon Lady Harriet's mind to induce her to deal with the fund in accordance with the late Duke's wishes.

Sir R. Baggallay and *Mr. Alfred Bailey* for the Duke of Portland; and

Mr. T. Stevens and *Mr. Baldwin Smith*, for Lady Harriet, contended that the present appointments were *bona fide* for her benefit, and quite distinguishable from the previous appointments, which had been held void.

JAMES, V.C., would not give an opinion as to whether it was possible for the Duke to make a good appointment under the circumstances, but at all events it could only have been done by means of such explicit declarations as would remove the influence known to be operating on the mind of the appointee. Nothing of the sort had been attempted, and he was therefore bound by the decision of the House of Lords in the previous suit to hold that the appointments were, technically, a fraud on the power.

JAMES, V.C. June 5, 22. } *Re* EUROPEAN CENTRAL RAILWAY CO. HOLDEN'S CASE.

Practice—Adjourned Summons—Costs.

This was an application to remove a name from the list of contributories, which was adjourned into Court, and there refused with 'the costs of the application.' A doubt having arisen as to the meaning of this order,

Mr. Bardswell, for the official liquidator, asked whether the words included the costs of the application or only the costs of the adjournment.

JAMES, V.C., said it was not the practice to give any costs of such applications in Chambers, and the practice would not be altered by the matter being adjourned into Court. Therefore the only costs given would be those of the adjournment.

Courts of Common Law.

Exchequer Chamber. (*Appeal from Q.B.*) June 14. } ENGELL *v.* FITCH AND OTHERS.

Damages, Measure of—Vendor and Purchaser—Power of Transferring Property, and Default in Delivering Possession—Profit on Re-sale.

In this case the defendants had put up to auction, subject to certain conditions of sale, the lease of a house mortgaged to them as trustees with a power of sale, which power they had become entitled to exercise. The particulars of the sale of the house stated that 'possession would be given on the completion of the purchase.' The plaintiff became purchaser of the premises, and no difficulty arose as to the title of the defendants, but the mortgagor being in possession of the house, refused to give it up, so that the defendants, though fully able to convey, were not in a situation to give possession according to the contract. The plaintiff having in the meantime re-sold the premises at an advance of 100*l.*, brought this action to recover not only his deposit and the expenses of investigating the title, but also the loss of the profit on the re-sale, as well as the expenses which he had incurred in preparing for the sale to his vendee.

The Court of Queen's Bench having decided (see 37 Law J. Rep. Q.B. 145) that the ordinary rule by which in sales of real property the damages for breach of the implied contract to make out a good title are limited to the amount of the deposit and the expenses of examining the title, has no application to a case where the failure, either to make out a title or to give possession, arises, not from the inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense; and that the purchaser could recover, not only the amount of the deposit and the expenses of examining the title, but the profit on a re-sale of the premises, and the cost of the conveyance to the sub-vendee.

The COURT (KELLY, C.B., CHANNELL, B., BYLES, J., M. SMITH, J., BRETT, J., and CLEASBY, B.) now affirmed this decision on the same grounds.

Decision affirmed.

Exchequer Chamber. (*Error from Q. B.*) *Magistrate's Case.* June 15. } CRAWSHAY *v.* MORGAN.

Poor Rate—Iron Mines, Non-Rateability of.

The question raised in this action was whether defendant was liable in respect of a distress for non-payment of poor-rates. The plaintiff had been assessed to the poor-rate in respect of his occupation of iron mines. The Court of Queen's Bench gave a formal judgment in favour of the plaintiff.

H. James, for the defendant, submitted that from certain expressions used in the judgments delivered by the House of Lords in *Jones* v. *The Mersey Docks and Harbour Board*, 35 Law J. Rep. M.C. 1, it might fairly be supposed that the occupier of iron mines, as well as the occupier of coal mines, came within the 43 El. c. 2, and was therefore liable to be rated, although in *Crease* v. *Sawle*, 2 Q. B. 862, 886, it had been held that the occupier of every mine, except coal mines, was exempt.

Manisty, contra, was not called upon.

Per Curiam (KELLY, C.B., BYLES, J., CHANNELL, B., MONTAGUE SMITH, J., BRETT, J., and CLEASBY, B.).—We entertain the same view as was held by this Court in *Crease* v. *Sawle*, and we adopt the language used in the conclusion of the judgment, reported 2 Q. B. 886. *Jones* v. *The Mersey Docks and Harbour Board* was a decision as to whether, in that case, there was a beneficial occupation or not, and the expressions relied upon were not necessary for the decision of that point.

Judgment affirmed.

Queen's Bench. Feb. 13. June 8. } SMITH *v.* STOCKS.

Statute of Limitations, 3 & 4 *Wm. IV. c.* 27—*Adverse Possession—Acts of Ownership—Surveyor of Highways.*

In this case the substantial question was whether the title of the defendant, as surveyor of highways, to a

certain gravel pit and road to it had become extinguished by the adverse possession of the plaintiff for more than twenty years, under 3 & 4 Wm. IV. c. 27. It appeared that from the year 1837 down to 1863 the surveyor of highways had ceased to take gravel from the pit or to use the road to it, but it was contended for the defendant that the surveyor for the time being did not by such non-use lose the right to the gravel, inasmuch as the plaintiff had not been in actual possession. It appeared that in 1837 the occupier (under the plaintiff) of the land in which the pit was dug filled up the greater portion of it with earth and rubbish, and took the whole surface into cultivation, and in 1839 another occupier brought the road leading to the pit into cultivation.

Barker (*Hannay* with him) for the plaintiff.

Quain for the defendant.

The Court (Mellor, J., and Hannen, J.), after taking time to consider, now held that the question of whether the plaintiff had been in possession depended on the intention with which certain acts had been done, and that by the filling up of the pit, &c., in 1837 and 1839 possession was actually taken in those years, and that the time of limitation began to run from them.

Judgment for the plaintiff.

Queen's Bench. June 12. } *In re* Walker.

Copyright—Painting—Photograph—Entry in Book of Registry—Expunging Entry—Person who shall deem Himself 'Aggrieved'—5 & 6 Vict. c. 45, s. 14—25 & 26 Vict. c. 68, s. 4.

Rule calling upon Henry Graves and the registering officer appointed by the Stationers' Company, for the purpose of 5 & 6 Vict. c. 45, to show cause why certain entries in the register of proprietors of copyright in paintings, drawings, and photographs, should not be expunged.

The applicant, G. B. Walker, had been convicted of selling photographic copies of the works of art the entries of which he sought to have expunged. At the hearing of the information, certified copies of the entries had been produced as *prima facie* evidence of the title of Henry Graves, and it had been alleged on behalf of G. B. Walker that the entries were insufficient and invalid, but no claim of title was set up.

Giffard and *Poland* showed cause against the rule.

Underdown supported it.

Per Curiam (Blackburn, J., Mellor, J., and Hannen, J.).—The fact of the applicant having been convicted does not entitle him to deem himself 'aggrieved' within the meaning of section 14 of 5 & 6 Vict. c. 45. He did not give any evidence to show that the entries were wrong, nor did he show that they were inconsistent with any right which he set up in himself or in other persons, or that they would interfere with any action which he intended to take with regard to the subjects of those entries.

Rule discharged.

Queen's Bench. May 21, June 8. } Cary and Another *v.* Dawson.

Bankruptcy — Liability, when Proveable — Agreement to Transfer Stock—12 & 13 Vict. c. 106, s. 178; 24 & 25 Vict. c. 134, s. 154.

In this case it appeared that the Marine Insurance Company had, in January 1866, lent a large sum in Consols to be deposited by the promoters of a bill then before Paliament. The plaintiffs, the defendant, and others, six in all, entered into an undertaking with the company that, if the bill was thrown out, the Consols should be returned, and that if it passed (which was the event that happened), an equal amount of stock should be transferred to the company, and that a sum, in the nature of interest on the value of the Consols at the time they were lent from the end of six months to the date of the transfer, should be paid to the company.

In June 1866 the defendant was adjudicated bankrupt. In July 1866 he obtained his certificate. In August 1866 the bill was passed, but the Consols were not transferred till July 1867, and the plaintiffs were compelled to pay under the undertaking 500*l.* as the equivalent for interest. The action was brought to recover contribution for a sixth part of this sum, and the question was whether the claim against the defendant in respect of the undertaking could in any way have been proved under the bankruptcy, so that the defendant was discharged by his certificate.

H. James for the plaintiffs.

Murphy for the defendant.

The Court (Cockburn, C.J., Blackburn, J., Lush, J., and Hayes, J.), after taking time to consider, now held that as at the time when the adjudication took place no value could have been put on the liability of the defendant, in case he and his co-contractors failed to transfer the stock in due time according to their undertaking, to pay interest until they did perform it, the liability was not provable under the bankruptcy statutes.

Judgment for the plaintiffs.

Queen's Bench. June 12. } Simpson *v.* Mackay.

Costs—Action of Slander—30 & 31 Vict. c. 142, s. 5.

The declaration contained three counts—one was for trespass, and the others were for slander. The jury gave a verdict upon the first count for the plaintiff, with 1*s.* damages; upon one of the slander counts they gave the plaintiff a verdict for 3*l.*, and upon the other a verdict for the defendant. Mellor, J., before whom the cause was tried, declined to certify that there was sufficient reason for bringing the action in this Court; and this rule was subsequently obtained, calling upon the defendant to show cause why the Court should not allow the plaintiff his costs.

Cooke showed cause against the rule, contending that section 5 of 30 & 31 Vict. c. 142 applied to actions of slander, although such actions could not be brought in a County Court; that the learned judge was right in declining to certify, as the plaintiff ought not to have brought an action of slander at all; and that this Court would take the same view and discharge the rule.

Finlay supported the rule, urging that section 5 could not apply to actions of slander, and also that upon the facts there was a substantial ground which justified the plaintiff in bringing the action for the words which had been spoken.

Per Curiam (Cockburn, C.J., Blackburn, J., Mellor, J., and Hannen, J.)—The fifth section is general in its terms and application. It applies to an action of slander, although such an action cannot be brought in a County Court. This Court must consider all the circumstances under which the action was brought, as well as the amount of damages, and the fact of the judge

having declined to certify. We think that in this particular case we ought not to allow the costs.

Rule discharged.

Queen's Bench. June 11. } HARDY *v.* FEATHERSTONHAUGH.

General Inclosure Act, 8 & 9 *Vict. c.* 118, *s.* 56—*Costs of Feigned Issue—'Event of Trial.'*

By the General Inclosure Act, 8 & 9 Vict. c. 118, s. 56, if any person, claiming to be interested in any land proposed to be inclosed under this Act, shall be dissatisfied with any determination of the Commissioners or Assistant Commissioner concerning any claim or interest in or to the land proposed to be inclosed under the powers hereinbefore contained, and shall cause notice in writing of such dissatisfaction to be delivered to the Commissioners within thirty days next after notice of such determination shall have been given to the several parties or persons specially interested, if any such there be, it shall be lawful for such person so dissatisfied, and giving such notice as aforesaid, to bring an action upon a feigned issue against the person in whose favour such determination shall have been made, or against the Commissioners, &c., and the verdict given upon the trial of such action shall be binding and conclusive upon all parties thereto, &c.; and after such verdict shall be given and final judgment obtained thereon, the Commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined, according to the event of such trial; and the costs attending any such action shall abide the event of the trial.'

The valuers appointed under this section having decided that the defendant was interested in 198 acres of land within the meaning of the Act, the plaintiff appealed against their decision, and the correctness of it was tried in a feigned issue between the plaintiff and the defendant. The question tried between the parties was whether the defendant was interested in the 198 acres. A verdict was found against the defendant in respect of about half of his claim. In taxing the costs the master allowed the plaintiff the general costs of the issue, and only allowed the defendant such costs as related to the claim which he had substantiated. In an application to review the taxation,

Gray appeared for the plaintiff, and

T. Jones for the defendant.

The COURT (COCKBURN, C.J., BLACKBURN, J., MELLOR, J., and HANNEN, J.) decided that the fact that the statute required that the party appealing should be plaintiff in the feigned issue must be put out of the question, and the liability to costs must depend upon the result of the issue and not merely upon the verdict. In the present case neither party was entitled to the general costs of the action, and the proportion payable by either must be measured by the substantial result of the issue.

Rule for master to review his taxation.

Exchequer Chamber. (*Appeal from C.P.*) June 17. } THE SOUTH OF IRELAND COLLIERY COMPANY *v.* WADDLE.

Corporation—Validity of Contract not under Seal.

The plaintiffs were a company incorporated under the Companies Act, 1862, for the purpose of excavating and working coal mines, and the question was whether they could sue for the breach of a contract which was not under seal, by which the defendants had agreed to supply the plaintiffs with a pumping engine and machinery for the use of a colliery of the plaintiffs. The Court of Common Pleas held that the action was maintainable. The case is reported 37 Law J. Rep. C.P. 211. The defendants appealed.

Maurice Powell argued for the appellants.

Huddleston was not called on for the plaintiffs.

The COURT (COCKBURN, C.J., KELLY, C.B., CHANNELL, B., BLACKBURN, J., LUSH, J., HAYES, J., CLEASBY, B.) held that the engine and machinery being necessary for the purposes for which the company was formed, the company could contract without seal for their supply.

Judgment affirmed.

Exchequer Chamber. (*Appeal from C. P.*) June 17. } CROSBY *v.* MILLINGTON.

Will—Construction of Devise—Copyhold Lands.

The question in this case was whether a freehold cottage and some freehold land passed under the following devise in a will, viz.: 'I devise all that my copyhold messuage cottages lands and hereditaments, now in the occupation of my sister,' &c. The testator had a copyhold messuage, consisting of three cottages converted internally into one dwelling, a copyhold cottage, and several copyhold lands answering the description in the devise as being in the occupation of his sister, &c. He had also a freehold cottage and a small quantity of freehold land, in like manner answering the above description as being in the occupation of his sister, &c. The Court of Common Pleas held that this freehold cottage and land passed under the above devise. The plaintiff entitled under the heir-at-law appealed.

Gray (*F. T. Streeten* with him) for the appellant.

Macnamara appeared for the devisee, but was not called on.

The COURT (COCKBURN, C.J., KELLY, C.B., CHANNELL, B., BLACKBURN, J., LUSH, J., HAYES, J., and CLEASBY, B.) were of opinion that the devise might be read as meaning all the testator's cottages and lands, both freehold and copyhold, which were then in the occupation of his sister, &c., and that therefore the freehold cottage and land in question passed under the devise.

Decision affirmed.

Exchequer Chamber. (*Appeal from C. P.*) June 17. } XENOS *v.* FOX.

Marine Insurance—Policy—Suing and Labouring Clause—Collision Clause—Costs of successfully Defending a Collision Suit.

Action on a policy of insurance which had been underwritten by the defendant for 100*l.*, and was an insurance for 6,000*l.* on plaintiff's vessel, the Smyrna, subject to a running-down clause attached to the policy by which the assurers agreed that in case the vessel should by accident or negligence run down or damage any other vessel, and the assured should thereby become liable to pay, and should pay as damages any sum not exceeding the value of the vessel assured and her freight by the judgment of any Court given in a suit defended with the previous consent in writing of the assurers, they would pay such proportion of three-fourths of the

sum so paid by the assured as the sum insured on the vessel bore to the value of such vessel and her freight. The policy was, in other respects, in the ordinary form of a Lloyd's policy with the usual suing and labouring clause. The Smyrna afterwards, and during the continuance of the risk insured, came into collision with a vessel called the Mars, and in consequence proceedings were taken in the Consular Court at Galatz against the plaintiff and the Smyrna by the owners of the Mars to recover a large sum of money for the damage occasioned to them by such collision. The plaintiff successfully defended these proceedings, and sought by this action on the policy to recover from the defendant his proportion of the costs incurred by the plaintiff in defending these proceedings. The Court below held that, admitting that the plaintiff so defended with the written consent of the assurers, still he was not entitled to recover on the policy, either under the collision clause or the suing and labouring clause; the collision clause not being applicable, since the plaintiffs had neither paid nor become liable to pay damages for collision, and the suing and labouring clause not applying to what were not the ordinary insurable perils. The case is reported 37 Law J. Rep. C.P. 294. The plaintiff appealed from this decision.

Sir G. Honyman (*W. Williams* with him) argued for the appellant.

Mathew (*G. Brown* with him) appeared for the defendant, but was not heard.

The Court (Cockburn, C.J., Kelly, C.B., Channell, B., Blackburn, J., Lush, J., Hayes, J., and Cleasby, B.) held that the judgment of the Common Pleas was right.

Judgment affirmed.

Exchequer Chamber. (*Appeal from C.P.*) Feb. 5, June 18. } Astley and Another *v.* Gurney and Others.

Bankruptcy—Deposit of Bills of Exchange as Collateral Security for Advances—Mutual Credit.

Appeal from the decision of the Court of Common Pleas, reported 38 Law J. Rep. C.P. 111. The facts were these:—The plaintiffs were the assignees in bankruptcy of Joyce & Co., for whom, before the bankruptcy, the defendants had accepted certain bills, Joyce & Co. undertaking to provide funds before their maturity, and depositing with the defendants, as collateral security, goods and other bills. These bills, which were so deposited, were indorsed by Joyce & Co. to the defendants, and became due on the same day as defendants' acceptances, and were paid at maturity. Before the day they became due Joyce & Co. were adjudged bankrupts. The money received by the defendants from these bills, as well as from the sale of the goods which had been deposited as such collateral security, was enough to provide for the defendants' said acceptances, and to leave a balance over. The plaintiffs, as such assignees, sued for that balance; and the Court below held that, as regards the money received from the bills which had been so deposited, the bankruptcy had not given credit to the defendants within the meaning of the mutual credit clause of the Bankrupt Act (12 & 13 Vict. c. 106, s. 171), and that therefore the defendants were not entitled to retain such money against a sum due to them from the estate of the bankrupts. The defendants appealed.

Garth (*Mathew* with him) for the appellants.

Field (*Lord* with him) for the plaintiffs.

Cur. adv. vult.

The judgment of the majority of the Court (Channell, B., Mellor, J., Pigott, B., Hannen, J., and Cleasby, B.), was that credit had been given within the meaning of the said mutual credit clause of the Act.

Kelly, C.B., dissented from this, and was of opinion that the judgment of the Court below should be affirmed.

Judgment reversed.

Exchequer Chamber. (*Appeal from C.P.*) June 18. } Fowler and Another *v.* The Bishop of Gloucester and Others.

Church—Church Building Act, 5 Geo. IV. c. 103—Right of Presentation to a Living.

Quare impedit, raising the question whether the plaintiff Fowler had a right to nominate and present to the bishop a spiritual person to fill up a vacancy in the incumbency of a church built under the Church Building Act, 5 Geo. IV. c. 103. The plaintiff Fowler had, with others exceeding three in number, subscribed in 1830 50*l.* and upwards towards building of the said church. Life trustees had been originally duly elected, but in July 1866 there was only one such trustee—viz. a Mr. Hilhouse—living, and he and Fowler were the only surviving subscribers of 50*l.* and upwards. In July 1866 Fowler, without communicating with Hilhouse, gave fourteen days' notice, according to section 7 of the 5 Geo. IV. c. 103, of a meeting to elect trustees, and on the day named attended and elected himself to be a life trustee; at that time Fowler was not a pew owner, but he became such in September 1867, when he afterwards gave notice of another meeting, and alone attended and elected himself again as life trustee. Mr. Hilhouse died in April 1867, leaving Fowler the only surviving subscriber of 50*l.* The incumbency became vacant on August 11, 1867, and on August 22, 1867, Fowler nominated to the incumbency the Rev. C. Wallace, who was his co-plaintiff.

The Court below (Willes, J., Keating, J., and Brett, J.) held that the plaintiff Fowler never became a trustee by election, and the majority of the Court (Brett, J., *dissentiente*) held that the plaintiff Fowler did not become trustee by virtue of section 8 of the Act, and that therefore his nomination was not valid. Section 8 enacts that if the number of persons subscribing to the building of the church 50*l.* and upwards shall not exceed three, such persons shall be deemed to be life trustees under the Act, and shall exercise all the authorities of life trustees chosen under the provisions of the Act. The majority of the Court considered that section 8 did not apply to a case where the subscribers, originally more than three, had since become reduced to a number not exceeding three. Brett, J., was, however, of a contrary opinion, and considered that Fowler had under the circumstances above mentioned become such trustee.

Judgment having been given by the Court of Common Pleas for the defendants, the plaintiffs appealed.

F. K. Wood argued for the appellants.

Lopes appeared for the defendants, but was not heard.

The Court (Kelly, C.B., Channell, B., Blackburn, J., Lush, J., Hayes, J., and Cleasby, B.), affirmed the decision of the Court of Common Pleas.

Judgment affirmed.

Exchequer Chamber. (*Appeal from C. P.*) June 18. } FORDHAM *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Negligence—Plaintiff's Negligence Contributing to the Injury—Railway Passenger.

Action for an injury the plaintiff had received through the negligence of the defendants' servant, a guard of a railway train, in shutting the door of the carriage into which the plaintiff was getting upon the plaintiff"s hand. The accident occurred at the Sydenham station between 8 and 9 in the evening of September 1867. The plaintiff having a bundle in his right hand, used his left to assist himself in getting into the railway carriage, by taking hold of the door-post on the hinge side of the door, when the guard came behind and, without any warning, slammed the door upon the plaintiff's hand. The jury found a verdict for the plaintiff, and the question was whether there was evidence of negligence of the guard sufficient to support the verdict, and also whether there was evidence of such contributory negligence on the part of the plaintiff that the judge ought to have withdrawn the case from the jury. The majority of the Court of Common Pleas (BYLES, J., and KEATING, J.) held (MONTAGUE SMITH *dissentiente*) that there was not such contributory negligence, and that the verdict ought not to be disturbed. The case is reported 37 Law J. Rep. C. P. 176.

The defendants appealed.

Huddleston (*Laing* with him) for the appellants.

Joyce appeared for the plaintiff, but was not heard.

The COURT (KELLY, C.B., CHANNELL, B., BLACKBURN, J., LUSH, J., HAYES, J., and CLEASBY, B.) affirmed the decision of the Court of Common Pleas, holding that there was evidence for the jury of negligence on the part of the guard; and that, although there was a strong case of contributory negligence on the part of the plaintiff, still, under all the circumstances, it was not such a case as ought to be withdrawn from the jury.

Decision affirmed.

Exchequer. June 21. } CAREW *v.* DUCKWORTH.

Action on Cheque—Notice of Dishonour.

This was an action on a cheque. The defence relied upon was that the defendant, the drawer, had not received due notice of dishonour.

At the trial it appeared that when the defendant gave the plaintiff the cheque, on February 28, he requested that it might not be presented for a few days, and it was not presented till March 10, when it was dishonoured. It further appeared that the defendant had, at the time of drawing, no funds at his banker's to meet the cheque, nor was there at the bank on the morning or evening of any day between March 2 and March 10 sufficient to meet it. The jury found that the defendant had no reasonable expectation that the cheque would be paid, and a verdict was entered for the plaintiff for the amount. A rule having been obtained on the ground that the defendant was entitled to notice of dishonour, and that no such notice had been proved,

G. Francis showed cause, contending that the drawer of a cheque, who has no remedy over on the instrument against anybody, cannot be prejudiced by not getting notice of dishonour, and that the finding of the jury was conclusive.

Joseph Sharpe contended, for the defendant (on the authority of *Orr* v. *Maginnis*, 7 East. 359), that the only case where the holder of a cheque was excused from giving notice of dishonour was where the drawer had no effects whatever in the banker's hands, either at the time of drawing or subsequently.

The COURT (BRAMWELL, B., CHANNELL, B., and CLEASBY, B.) discharged the rule.

Rule discharged.

Common Pleas. June 18. } LAURIE *v.* SCHOLEFIELD.

Action on Guarantee—Construction—Part Payment—Pleading.

This was an action on a guarantee. It appeared at the trial that R. & Co., being desirous of having an account at, and being given credit by, the bank of which the plaintiff was public officer, and the bank requiring security, the following guarantee was given by the defendant and another person:—'In consideration of the Union Bank of London agreeing to advance and advancing the firm of Russell & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole the sum of 1,000*l.*, we hereby jointly and severally guarantee the payment of any such sum or sums as may be owing to the said bank at the expiration of the said period of eighteen months, and undertake to pay the same on demand in the event of Russell & Co. making default in the payment of the same.'

It also appeared that the bank gave credit to R. & Co. for 1,000*l.*, and that there was a running account in which the credit, at times, and sums paid in exceeded that amount. The defendant contended that the meaning of the guarantee was that credit was not to be given at any time beyond 1,000*l.*, that the payments must be appropriated, and that if this were not so, yet he could give in evidence a payment of 500*l.* by his co-surety after action, though not pleaded. A verdict was found for 1,000*l.*, with leave to move to enter a nonsuit or reduce the damages. A rule *nisi* was granted.

Garth and *Rochfort Clarke* showed cause.

Sir J. Honyman and *Philbrick* in support of the rule.

The COURT held that the contentions of the defendant were unsound, and discharged the rule, the plaintiff consenting to reduce the damages, as the defendant's mistake in pleading was only technical.

Common Pleas. June 18. } ADAMS *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Negligence—Railway Company—Injury to Passenger.

The plaintiff was a passenger by the defendants' railway, and brought his action for injury alleged to have been sustained by him through the defendants' negligence under the following circumstances.

The plaintiff took his place in a third-class carriage of a train, which stopped at short intervals. The door flew open, and the plaintiff shut it several times: the last time it flew open the plaintiff took hold of it with one hand, and leaning so as to throw some of his weight on the door, attempted with the other to fasten the lock, which was on the outside; and a jerk occurring, he was thrown out. It would have taken only a minute or two to arrive at the next station, and there was nothing to show that the weather (it was July) was bad, or that he suffered from draught, and he might have changed his

place. A verdict was found for the plaintiff, with leave to the defendants to move to enter a nonsuit. A rule *nisi* was granted.

R. G. Williams showed cause.

Bayliss supported the rule.

The COURT held that the injury was not proximately due to the defendants' negligence in having an improper lock, but to the plaintiff's doing an act which was perilous, and not necessitated by the circumstances, that he must therefore bear the consequences, and that there was no evidence to go to the jury, and the rule therefore ought to be made absolute.

Probate and Matrimonial Causes.

Probate.
May 22, June 8. } PECHELL *v.* HILDERLEY AND OTHERS.

Will and Codicil not duly Executed—Second Codicil Endorsed on Back of Will, and Executed in accordance with the Forms of, although not valid by, the Law of the Country where made—Confirmation—Foreign Law— 24 & 25 *Vict. c.* 114.

The testator, Capt. H. S. Pechell, late of the Royal Artillery, died on Dec. 20, 1867, leaving behind him a paper writing purporting to be a will, which was executed in India, but was witnessed by only one witness. On the back of the will he wrote two codicils—one at Genoa, the other at Florence; but neither was witnessed. According to the law of Italy, codicil No. 1 was void, the day of the month having been omitted from the date. As to the second, Signor Ottolenghi, an Italian advocate, made affidavit as follows:—

'And I further say that, according to the said testamentary laws of Italy, the second endorsement, assuming that the whole and each word thereof was written by the testator, would, taken by itself, so far as the extrinsic form is concerned, be valid as a testamentary disposition, but as a codicil containing merely an amendment to a will, the Italian Courts would not give it an independent existence, and would consider it to be valid or invalid according as the will to which it related is valid or invalid.

'And I lastly say that, by the testamentary laws of Italy a will which is not itself executed in accordance with the requirements of the Civil Code of that country, and which is therefore invalid, will not acquire validity by the fact that a testamentary disposition properly executed is afterwards endorsed upon the back of it, even although such testamentary disposition refers in express terms to the date or contents of such will.'

The instruments were propounded by the defendant as the representative of the residuary legatee; the plaintiff, a brother of the deceased, denied their validity; and the cause was heard before Lord PENZANCE on May 22.

Dr. Middleton for the plaintiff.

Underdown for the defendant.

Cur. adv. vult.

June 8.—Lord PENZANCE:—The testator in this case left behind him a paper writing purporting to be a will. It was executed by him in India, and at that time was not witnessed by more than one witness, if witnessed at all. This paper, it is admitted, fails for want of due execution, unless it is set up by one or other of the two codicils which are endorsed upon it. The first codicil appears to have been written three years after the will, when the testator was at Florence. It is holograph and signed by the testator, but not witnessed. It is also dated so far as the month and year are concerned, but not the day of the month, for it is headed, 'Codicil, April 1866.' The second codicil is also holograph and signed by the testator, and is further fully dated. It is headed '2nd Codicil.' This codicil was executed in Genoa. Neither of these codicils having been duly executed according to the English statute, the first question that arises is, whether either of them was so executed as to constitute a valid testamentary disposition according to the law of Italy. The affidavit of the Italian advocate, which has been laid before the Court, establishes the contrary. As to the first codicil, it appears that the execution of it fails for want of the full date, including the day of the month, being inscribed thereon. As to the second codicil, it appears that the execution is sufficient, but that, being only a codicil to a will, it would not be upheld by the Italian law as an independent paper; and that, unless the will were valid, the codicil must fail with it. The affidavit further states that by the Italian law this codicil would have no operation upon the will, though endorsed upon, and referring to, it. The will, therefore, being originally invalid, and the codicil having neither the effect of establishing it nor the right to be considered a testamentary paper standing alone, neither of these papers would be held valid in Italy, the country where they were made. It was, however, further argued that by regarding the validity of these papers, partly according to the Italian law and partly according to the English law, a valid will and codicil would be the result. The Court was invited to regard so much of the Italian law as held the second codicil well executed, and then, dropping the Italian law and recurring to the English, to hold that this paper being well executed, endorsed upon the will, and referring to the will, operated in a republication of the will, and thereby established it. Whether such would be the effect of applying the English law in the manner proposed, it is not necessary to discuss. For I am of opinion that, in determining the question whether any paper is testamentary, regard can be had to the law of one country only at a time, and that the mixing up of the legal precepts of two different countries can only result in conclusions conformable to neither. The COURT, therefore, pronounces against all the papers.

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LORDS JUSTICES. June 26. } *In re* LUSH'S TRUSTS.

Married Woman—Fraud—Assignment of Reversionary Interest—Equity to a Settlement.

The Law Reversionary Interest Society appealed from the decision of the MASTER OF THE ROLLS, shortly noticed *antè*, p. 104.

Mrs. Bowren, at the time of her marriage, was entitled to a reversionary interest in a sum of money. This interest was not settled upon the marriage, and the husband being in want of money, she, under coercion as was stated, and at his dictation, wrote out and signed in her maiden name a document purporting to be executed two days before the marriage, whereby she assigned all her reversionary interest to him. The husband then sold, or pretended to sell, the reversion to a purchaser against whom a decree for specific performance was obtained by collusion, and the title being apparently confirmed by the Court, the purchaser abandoned his contract, and the reversion was put up for sale by auction and purchased at its full value by the Law Reversionary Interest Society. Before this purchase was completed, Mrs. Bowren, her husband being then in prison, wrote, for the satisfaction of the purchasers, a letter to one of the trustees of the fund, stating that she had before marriage assigned it to her husband. The reversion having fallen in, the trustees paid the fund into Court under the Trustees Relief Act, and the Reversionary Interest Society petitioned for payment out of Court.

The MASTER OF THE ROLLS held that the assignment was not binding on Mrs. Bowren, and directed the dividends to be paid to her till further order.

The Reversionary Interest Society appealed.

Mr. Jessel and *Mr. Bristowe* for the appellants.

Sir R. Baggallay and *Mr. Cutler* for the respondent.

Their LORDSHIPS held that Mrs. Bowren could not, in the face of the gross fraud to which she had been a party, set up her equity to a settlement. Even if the assignment were executed under coercion, the letter which was written while her husband was in prison was voluntary. The order of the MASTER OF THE ROLLS must be discharged, and the money paid to the appellants.

STUART, V.C. June 28. } *In re* COPE'S TRUST. FAUNTLEROY *v.* COPE.

Reversionary Chose in Action—Policy of Insurance on Death of Husband or Wife.

Mr. John Cope effected a policy of insurance with the British Empire Mutual Association, under which upon the death of himself or his wife, whichever should die first, a sum of 500*l.* was to be paid to the survivor. Mr. Cope afterwards deposited the policy with Messrs. Atwood & Spooner, the bankers, of Birmingham, to secure an advance, and Mr. and Mrs. Cope together subsequently assigned the policy to the Birmingham Bank, which succeeded to the business of Messrs. Atwood & Spooner. Mr. Cope having died in his wife's lifetime, and a suit having been instituted for the administration of his estate, the policy moneys were claimed both by his widow and by the Birmingham Bank; and the moneys having been paid into Court by the association, a petition was presented by the executors of Mr. John Cope, in order to determine the rights of the parties.

Mr. Field for the petitioners.

Mr. Ludlow, for the Birmingham Bank, contended that the contract was entirely a contract with Mr. John Cope, and that the assignment passed all his interest, and all his wife's interest (this being not a reversionary

chose in action), and amounted to a binding direction to pay the money to the bank and not to the survivor.

Mr. Freeling, *Mr. Cracknell*, and *Mr. F. C. J. Millar* appeared for other parties.

His HONOUR considered that the bank could acquire, under the assignment, no other interest than that of the husband, and that the widow of Mr. Cope was entitled to the money.

MALINS, V.C. June 23. } *In re* LAND SHIPPING COLLIERY COMPANY. DAVID JONES'S CASE.

Company—Contributory—Negligence—Delay.

Motion on behalf of David Jones to take his name off the list of contributories on the ground that he had never applied for shares, nor to his knowledge ever had any allotted to him.

Mr. Osborne and *Mr. Bevir* for the motion.

Mr. Glasse and *Mr. Cottrell*, for the official liquidator, opposed on the ground of delay, and also that the application had already been refused in January last.

The VICE-CHANCELLOR said that, both on principle and on the authority of the cases, negligence and delay were not of themselves enough to make a man a contributory of a company in which he could prove that he was not a shareholder. And where good cause was shown the Court could enlarge the time for appealing in such matters. But in this case the evidence showed that the case now attempted to be made was an afterthought; Jones had already applied to be relieved of his shares on the ground that he was induced to take them by fraud, and that application had been refused; he could not now be heard to say that he had never taken them at all.

MALINS, V.C. June 11, 25. } *In re* WATNOUGH'S TRUSTS.

Will—Bequest to Build for Charitable Purposes—Statute of Mortmain.

Testator gave, after the decease of his wife, the residue of his property (amounting to about 530*l.*) into the hands of his executors, 'to be given, used, and employed towards the erection of a new Wesleyan chapel at St. Helen's, instead of the one now in use, when such erection shall take place.'

The fund having been paid into Court upon the death of the widow, the trustees of the Wesleyan chapel now petitioned for payment out. The evidence showed that at the date of the testator's death there had been some discussion on the subject of a new chapel, but no actual scheme had been constructed. Subsequently the trustees of the Wesleyan community acquired fresh land, and were now desirous of applying this bequest for the purposes of their chapel.

Mr. Glasse and *Mr. Rowcliffe* for the Wesleyan trustees:—This is a good bequest; there is no necessity for supposing that any part of it need be applied to the acquisition of land on which to erect the chapel.

Mr. Wickens for the Attorney-General:—This gift can only be void on the doctrine of 'tendency to bring land into mortmain,' which was exploded in *Philpot* v. *St. George's Hospital*, 6 H.L.C. 313. In any case I claim it for charitable purposes, on the doctrine of *cy-près*.

Mr. Cole and *Mr. L. Bird*, for next of kin of testator, submitted that the bequest was void under the Statute of Mortmain.

The VICE-CHANCELLOR said that it had been long established that a naked bequest for the purposes of building necessarily carried with it a direction to purchase land. This implication could only be excluded by direct words to that effect in the will, and in the present will there was no language sufficient for that purpose; nor could evidence be admitted *aliunde* to show that the money would not be used for the acquisition of land. Petition dismissed; costs of all parties out of the estate.

MALINS, V.C. June 24. } MORLEY *v.* SAUNDERS.

Legacy—Right of Set-off—Non-payment of Interest by Tenant for Life of Estates Charged under a Term of Years.

This was a claim by the executors of Francis Morley in respect of a legacy of 1,000*l.*, bequeathed to him under the will of Mary Morley. The payment of the legacy was resisted on the ground that Francis Morley had been for several years in actual possession as tenant for life of certain estates charged (under a term of 500 years) with the payment of interest at 4*l.* per cent. upon a sum of 4,500*l.* due to Mary Morley's estate, which interest, however, he had not paid.

The question was whether, as between the two estates, there was a right of set-off and retainer in respect of such unpaid interest.

Mr. Cotton and *Mr. Jolliffe* for the executors of Francis Morley.

Mr. Glasse and *Mr. North*, for the executor of Mary Morley, contended that the obligation upon the tenant for life to keep down the interest was personal, and therefore his estate was liable as for a breach of trust.

MALINS, V.C., held that no claim could be sustained on behalf of Mary Morley against the tenant for life for arrears of unpaid interest, whatever question there might be as between the tenant for life and remaindermen. The legacy must therefore be paid in full.

JAMES, V.C. June 11. } *Re* KERR'S POLICY.

Equitable Mortgage—Interest.

This was a petition under the Trustee Relief Act in respect of a fund representing a sum of 1,000*l.* paid in by the London Life Association, being the amount secured by a policy of assurance effected on the life of John Kerr, deceased. The petitioner stated that he was the executor of William Grace, who, in 1850, advanced the sum of 300*l.* by way of loan to the said John Kerr, who promised to repay the same, and that the repayment of the said sum 'and interest' was secured by the deposit of the policy aforesaid, due notice of which was given to the insurance company. He now claimed the said principal sum of 300*l.* and 111*l.* 4*s.* 3*d.* in respect of the premiums which had been paid either by the said William Grace or by himself since 1850, and also 352*l.* 5*s.* for interest at 5 per cent. as from the dates when such sums were advanced respectively, besides the costs of this application. The claim for interest was disputed by

Mr. Higgins for the insurance company, and by

Mr. Daniel Jones for the personal representative of John Kerr, on the ground that there was no evidence of any contract as to interest, and that a mere equitable mortgage by way of deposit did not of itself imply any such contract.

Mr. North, for the petitioner, relied on *Carey* v. *Doyne*, 5 Ir. Ch. 104.

JAMES, V.C., held that the petitioner was entitled to interest, though only at 4 per cent. If he had had to

determine the case for the first time, he should have determined it in the same way as the Master of the Rolls did in Ireland in the case which had been cited. An equitable mortgage by deposit was in fact equivalent to an agreement to execute a legal mortgage in the usual form, which would include a covenant for payment of interest. But at all events he was bound by the decision of the Irish Court, especially on a point like this, on which it was very important that the rule should be uniform, but mattered little which way it was settled.

James, V.C. June 12. } Grunwell *v.* Garner.

Practice—Children Born after Decree—Supplemental Order.

This was an administration suit under a will by which real estate and personal estate had been directed to be sold, and the proceeds to be held upon certain trusts for the benefit of the children therein named as a class. All the children then born were made parties, but one child was born after the decree, and it was afterwards found that another had been born before the decree, but after the institution of the suit. Under these circumstances

Mr. R. G. Hawkins now moved for a supplemental order, the Registrar having declined to make it as of course under the 15 & 16 Vict. c. 82, s. 52.

James, V.C., considering that the fact of the children taking as a class made a substantial difference between this case and *Capps* v. *Capps*, Law Rep. 4 Chanc. 1, in which Lord Cairns had refused the application, made the order asked for, inserting a statement that it appeared to be for the benefit of the infants.

Courts of Common Law.

Bail Court. June 12. } Regina *v.* Lord Newborough and Others.

Certiorari—Special Constables, Order for Payment of—1 & 2 Wm. IV. c. 41.

Coram Lush, J., and Hayes, J.

The Court in its discretion will not grant a writ of *certiorari* for the purpose of quashing an order of justices for payment of expenses incurred in the employment of special constables, made under the 1 & 2 Wm. IV. c. 41, s. 13, after the order has been obeyed by the treasurer and the money paid, and the payment allowed by the quarter sessions in the accounts of the treasurer.

Poland on a former day had obtained a rule *nisi* for a *certiorari* to remove an order made by Lord Newborough and two other justices of Carnarvonshire on the treasurer of the county for payment of expenses incurred in respect of the payment of special constables employed during the late Parliamentary election, on the grounds that the order did not show on the face of it that the justices were sitting at a special sessions held for the purpose of making it as required by 1 & 2 Wm. IV. c. 41; or (2) the justices making it were the justices usually acting for the division of the county in which they were then sitting; or (3) that it was made on the oath of a credible witness; or (4) that the sum ordered to be paid was a reasonable sum; or (5) that the constables had been duly appointed to serve; or (6) that there was any precept in writing for their appointment, or sufficient information on oath to lead the precept, or that the order was sealed.

The order in question was made at the close of the business of one of the ordinary special sessions of the year, and was as follows:—'To the Treasurer of the County: Pay the above 95*l.* 1*s.* 3*d.*' and was signed by the three defendants, and was attached to bills containing charges in respect of the appointment of special constables and for the supply of staves, the total of which amounted to the sum in question. The election was held in November 1868. The order was made on December 5, 1868. The quarter sessions were held on January 9, 1869, when the payment, in obedience to the above orders, was allowed in the accounts of the treasurer.

Maule (*M'Intyre* with him) now showed cause. He contended that this order was not made in a contentious matter, did not require the formalities of a conviction, but was only in the nature of a direction to the treasurer; and next, that the issuing of this writ was discretionary with the Court, who would not grant it after the order had been acted upon.

Poland contra.

Lush, J.—If the order be a mere nullity the interference of the Court is not necessary; but if not, and our interference is required, in the exercise of our discretion, we must refuse to grant the writ on the ground that the order has been obeyed by the treasurer, the money paid, and the item allowed by the quarter sessions in his accounts; and it would, therefore, now be most inconvenient if the matter were reopened.

Hayes, J. concurred.

Rule discharged.

Queen's Bench. June 15. } Myers *v.* Veitch.

Bankruptcy—Detention of Bankrupt after Notice of Protection from Arrest—'Officer' Arresting Bankrupt—Gaoler—12 & 13 Vict. c. 106, s. 113.

By the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), s. 113, if any bankrupt shall be arrested for debt or on any escape warrant in coming to surrender, or shall after his surrender, and while protected by order of the Court, be so arrested, he shall on producing such protection to the officer who shall arrest him, and giving *such officer* a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shown such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit

to such bankrupt for his own use the sum of 5*l.* for every day he shall detain such bankrupt, &c.

The question in this case was whether the defendant, who was gaoler of the gaol where the plaintiff, a bankrupt, had been taken after his arrest, was liable to the penalties imposed by the above section, upon proof that he had refused to discharge the plaintiff from custody after the production of his certificate of protection.

C. Russell for the plaintiff.

C. Crompton for the defendant.

The COURT (BLACKBURN, J., LUSH, J., and HAYES. J.) held that the operation of the section, which was a penal one, must be limited to the officer arresting the bankrupt, and that the defendant was therefore not liable.

Judgment for the defendant.

Queen's Bench. June 24. } JOHNSON *v.* SKAFTE.

The Bankruptcy Act, 1861, *s.* 153—*Demand in the Nature of Damages*—'*Contract or Promise*'—*Discharge*—*Landlord and Tenant*—*Distress.*

This was a case stated upon appeal against the judgment of the County Court at Liverpool.

The plaintiff was under-tenant to the defendant of a room in a warehouse of which the defendant was tenant. The defendant failed to pay his rent, and his landlord, putting in a distress, seized goods of the plaintiff, who thereupon paid 15*l.* to get rid of the distress. The action was brought against the defendant to recover damages for the injury suffered by the plaintiff.

The defendant had become bankrupt, and the question arose whether the discharge obtained by him was a bar to the claim. The learned County Court judge held that it was not, and the plaintiff recovered, by verdict of the jury, 25*l.*

R. G. Williams, for the appellant, contended that the discharge was a bar. The defendant was liable, by reason of a contract or promise, to a demand in the nature of damages, which had not been ascertained. The proper course to be pursued by the plaintiff was, under section 153 of the Bankrupt Act, 1861, to have the damages assessed, and then to prove them as a debt.

Wheeler for the respondent.—Section 153 only applies where there has been an express contract and an admitted breach of such contract. It is only in such a case that the creditor is bound to avail himself of the machinery provided by the Act.

Per Curiam (LUSH, J., and HAYES, J.).—This section applies to express contracts, but the only contract which can be said to exist in this case is one which the law implies from the relationship existing between the parties, that the defendant will indemnify the plaintiff against the injury he has suffered by reason of his goods having been distrained through the default of the defendant.

Judgment for the respondent.

Queen's Bench. June 25. } WRIGHT *v.* PEARSON.

Act for making Owners of Dogs liable for Injuries to Cattle or Sheep (28 & 29 *Vict. c.* 60)—*Horses included under Word* '*Cattle.*'

By 28 & 29 Vict. c. 60, after reciting that it is expedient to amend the law as to the liability of the owners of dogs for injuries done to cattle and sheep by such dogs, it is enacted that the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such mischievous propensity, or that the injury was attributable to neglect on the part of such owner.

In the present case a mare had been bitten by a dog belonging to the defendant, and the question arose whether horses were included under the term 'cattle' in the section.

Kemplay for the plaintiff, and

A. Wills (*Steele* with him) for the defendant.

The COURT (LUSH, J., and HAYES, J.) held that, as horses in common parlance were included under the term 'cattle,' and as the statute was a remedial one, there was no ground for limiting its operation to sheep, cows, &c.

Judgment for the plaintiff.

Queen's Bench. June 25. } KILSHAW *v.* JUMP.

Debtor and Creditor—Assent by Limited Liability Company to Trust Deed—Assent by Procuration—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192.

In this case two questions arose upon the construction of 24 & 25 Vict. c. 134, s. 192, which requires, in order that a trust deed should be binding on non-assenting creditors, that a certain majority of the whole creditors should 'in writing assent to or approve of such deed or instrument.' It appeared that one of the creditors was a banking company, registered under the Companies Act, 1862, and their agent had signed the deed as assenting to it. Another creditor had assented to the deed through his agent, who signed as agent and on behalf of the creditor. It was objected by the plaintiff that in each case the form of the assent was defective, as the company could only give such an assent under their common seal, and that in the case of a private individual the assent could not be given by procuration.

Quain (*Wheeler* with him) for the plaintiff.

Holker, for the defendant, was not heard.

The COURT (LUSH, J., and HAYES, J.) overruled both these objections, and held that in each case the form of assent was sufficient.

Judgment for the defendant.

Exchequer. June 23. } THOMAS *v.* HAYWARD.

Demise of a Public House—Covenant not to keep Public House within certain Distance of the Demised Premises—Covenant not Running with the Land.

Declaration by the assignee of the lease of a public house against the lessor for breach of a covenant not to build, erect, or keep, or be interested or concerned in building, erecting, or keeping a house for the sale of beer or spirits within half a mile of the demised premises.

Demurrer.

J. Brown for the demurrer.

Ryalls for the declaration.

The COURT (BRAMWELL, B., CHANNELL, B., and CLEASBY, B.), being of opinion that the covenant did not run with the land, gave judgment for the defendant.

Judgment for the defendant.

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Privy Council. June 30.

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Ecclesiastical Law—Church Discipline Act, 3 & 4 *Vict. c.* 86—*Construction—Letters of Request—Arches Court, Official Principal—Jurisdiction of.*

Present: the Lord Chancellor, the Archbishop of York, the Bishop of London, Sir W. Erle, and Sir J. Napier.

This was an appeal from a decree of the official principal of the Arches Court of Canterbury, by which the official principal declined to accept letters of request under the hand and seal of Robert John, Bishop of Bath and Wells, by which the said bishop, by virtue of the Church Discipline Act (3 & 4 Vict. c. 86), did request the said official principal, his surrogate, or other competent judge in that behalf, to issue a citation to the Rev. W. J. E. Bennett, a clerk in holy orders, of the United Church of England and Ireland, Vicar of Frome Selwood, in the county of Somerset, in the diocese of Bath and Wells, to appear at a certain time and place to answer certain articles for having offended against the laws ecclesiastical. The official principal declined to entertain the letters of request, on the ground that clause 13 of the Church Discipline Act does not impose the duty upon the official Principal of the Arches universally, but only in the cases in which the official Principal approves of the reason which induced the bishop to send the letters of request, and that there is no duty in any other case to accept or act upon the letters of request.

Mr. A. J. Stephens, Dr. Tristram, Mr. Archibald, and *Mr. B. Shaw* for the appellant.

Mr. Phillimore for the official principal of the Arches Court.

The other respondent did not appear.

The Lord Chancellor, in delivering the judgment of their Lordships, stated that their Lordships were of opinion that, according to the true construction of section 13 of the Church Discipline Act, the judge of the Arches Court cannot refuse to deal with a case which has been brought before him; that the words of the enactment, 'to be there heard and determined according to the law and practice of such Court,' are to be construed to secure the duty as well as the power of hearing and determining all cases sent.

Privy Council. July 5.

Stephens *v.* Broomfield and Another The Great Pacific.

Admiralty—Bottomry Bond—Conditions of—Constructive Total Loss—Rights of Bondholder.

Present: the Master of the Rolls, Sir W. Colvile, Sir W. Erle, and Sir J. Napier.

This was an appeal from a decree of the judge of the High Court of Admiralty of England.

The cause in which the appeal was brought was a cause of bottomry promoted by the respondents, who were the plaintiffs in the Court below, as the legal holders of a bottomry bond on the ship Great Pacific.

The appellant, the defendant in the Court below, was the mortgagee of the said ship, and intervened in the Court below for the purpose of defending his interest in the ship as mortgagee.

The facts were as follows:—The Great Pacific, being on a voyage from Callao to the Chincha Islands, and thence to the United Kingdom, put into Sydney for necessary repairs, and for the purpose of such repairs the master was obliged to borrow of the respondents a sum of 5,037*l.* 13*s.* 5*d.* on bottomry of the said ship.

The said bond provided that, if the ship should complete her voyage, and if her owners should pay the amount borrowed and interest within twelve hours after the arrival of the said ship at the port of discharge, or, in case of the loss of the said ship, such average as by custom should be due; or, if such ship should be utterly cast away, then such bond should be void.

The ship in the course of her voyage was caught in a hurricane, and was sold at Valparaiso, as unworthy of repairs, for the sum of 3,628*l.* 8*s.*

The appellant contended that, under these circumstances, the bond had never become payable, and that the respondents were not entitled to any of the proceeds of the sale of the said ship, but that, even if the respondents were entitled to a portion of the moneys realised by the sale, yet that they were only entitled to such average as by custom should be due.

The learned judge of the Admiralty Court pronounced judgment for the respondents as such bondholders for the whole sum claimed, and condemned the appellant in costs.

Sir G. Honyman and *Mr. Clarkson* for the appellant.

Mr. Butt and *Mr. Cohen* for the respondents.

Sir J. Colvile.—Their Lordships are of opinion that the decree of the judge of the Admiralty Court was right and ought to be affirmed. *Judgment affirmed.*

Courts of Equity.

Lord Romilly, M.R. June 12. — The Freehold Land and Brickmaking Company *v.* Pargo and Others.

Company—Winding-up—Suit by Official Liquidator—Costs.

This was a bill filed with the permission of the Court by the official liquidator of the company, which was being wound up; 250*l.* had long been set aside out of the assets of the company, by order of the Court, to meet the contingency of the plaintiff being ordered to pay the defendants' costs. No agreement had been made by any of the shareholders to indemnify the official liquidator.

The defendants now moved to dismiss the bill for want of prosecution, and asked for their costs against the official liquidator.

Mr. Higgins for the defendants.

Mr. Locock Webb, for the official liquidator, said that the whole assets of the company were insufficient to meet the costs. As the bill had been filed by leave of the Court, the official liquidator ought not to be left to bear the defendants' costs personally.

The Master of the Rolls said that there was no help for the position of the official liquidator, who was personally liable, and must be ordered to pay the costs, including those of the present motion. All that could be done was to allow him, when he had paid the costs, to repay himself out of the fund of 250*l.* or other assets of the company, if any.

Lord Romilly, M.R. June 12. — *In re* Estates Investment Company. *Ex parte* Turnley and Oliver.

Company—Winding-up—Companies Act, 1862, *s.* 124—*Order at Instance of Stranger to Company.*

Messrs. Turnley and Oliver had carried in a claim, as creditors against the above company, under the winding-up, and a Mr. Alcock, whose name was then on the register, obtained an order to cross-examine them, under which one of them had been cross-examined. Alcock afterwards succeeded in getting his name removed from the register of shareholders.

Sir R. Palmer and *Mr. Cracknall*, for Messrs. Turnley and Oliver, now moved to discharge the order for cross-examination obtained by Alcock, as having been obtained by a stranger to the company.

Mr. Jessel and *Mr. Everitt*, contra, contended, first, that this was an appeal or rehearing within section 124 of the Companies Act, 1862, notice of which, therefore, ought to have, but had not been given within three weeks. Secondly, the order was obtained for the benefit of others beside Alcock, who still remained contributories, and who ought not to be deprived of the benefit of it.

The Master of the Rolls held that the order was a nullity, as having been made at the instance of a person who afterwards turned out to be a stranger to the company; but although, consequently, the Court had power to discharge the order, yet he considered that any contributory who thought fit should be allowed to move for leave to take the benefit of the proceedings which had been taken under the order. To allow this to be done, he would order the present motion to stand over.

Lord Romilly, M.R. June 28. — Wilkinson *v.* Lindgren.

Will—Gift Void for Uncertainty—Resulting Trust for Next of Kin.

This was the further consideration of a suit for the administration of the estate of Mary Davison, who, by her will, after having bequeathed legacies to various charitable institutions by name, gave the residue of her personal estate to trustees in trust to pay and divide the same to and among 'the different institutions,' *or to any other religious institutions or purposes*, as the said trustees might think proper, which disposition she entirely left to their discretion. The question was whether this was good to any extent as a charitable bequest, or raised a resulting trust for the next of kin.

Sir R. Baggallay and *Mr. C. Hall* contended that this was either a charitable bequest, or at least gave the trustees a discretion as to whether they would pay the residue to the charities or to the next of kin.

Mr. Roxburgh and *Mr. Phear*, for the next of kin, contended that the gift being for general benevolent purposes was void, and that there arose a resulting trust.

The Master of the Rolls held that the gift of residue failed, and directed an inquiry as to who were the next of kin.

Lord Romilly, M.R. June 29. — Wagstaffe *v.* Wagstaffe.

Will—Construction—Wills Act, s. 24—*Word 'Now.'*

This was the hearing or further consideration of a suit to administer the estate of James Wagstaffe, deceased, whose will contained the following bequest:—'I desire that all my ready money, bank and other shares, freehold property, plate (family), pictures and coins, books, and any other property that I may *now* possess, except the house situated at Plumstead, in the county of Kent (this belongs to my daughter Elizabeth), shall be valued, and if necessary, sold, the proceeds to be divided into eight parts in the following manner:—first, to my only daughter, Elizabeth Wagstaffe, two eighth shares, the remaining six parts to be equally divided among my six sons' (whom the testator then named). 'All debts that are now due, or that may fall due, on any liabilities that may arise out of this my estate to be equally divided among and settled by the said six sons above-named.'

The will was dated July 22, 1865. Testator died on August 13, 1867.

The question was whether the above bequest comprised only property which the testator possessed at the date of the will, or (notwithstanding the use of the word

'now') extended to property of which the testator was possessed at his decease.

It was stated that, though real estate was devised, there was none in fact.

Mr. Jolliffe, for the plaintiff, who was one of the six sons, contended that the word 'now' took the bequest out of the operation of section 24 of the Wills Act, on the authority of *Cole* v. *Scott*, 1 Mac. & Gor. 518, and confined the bequest to what the testator had at the date of the will.

Mr. W. W. Cooper for the defendant (another son), in the same interest.

Mr. Southgate and *Mr. A. G. Marten*, for testator's daughter Elizabeth, *contra*, were not called on.

The Master of the Rolls held that here there were not, as in the case of *Cole* v. *Scott*, clear and distinct words indicating an intention to make the will speak from the date of it, and not from the death. He considered that the words 'all I now possess' were no stronger than such words as 'all my estate,' or 'all I possess.' The bequest, therefore, must be held to comprise what the testator had at his death.

Lord Romilly, M.R. June 29. } Kirkmann *v.* Lewis.

Will—Mortmain—Bequest Void for Uncertainty.

This was the further consideration of a suit for the administration of the estate of a Mr. Kirkmann, whose will contained a bequest by which the testator directed his residuary personal estate to be applied in the construction of a well, and in the erection of a public pump and a tank, in any suitable place in the parish of Llangorse; after which the surplus, if any, was to be paid to the rector, to be expended by him for the benefit of a school in the parish.

Sir R. Baggallay and *Mr. Bagshawe* for the plaintiff.

Mr. Wickens, for the Crown, contended that this was a good charitable bequest, at any rate, to the extent of the surplus. The cost of sinking a well was ascertainable, since persons with local knowledge could always be found, who would contract for a fixed price to sink a well in a particular locality until water was reached. Supposing, therefore, the gift to sink a well to be void under the Statutes of Mortmain (which he did not dispute), yet the cost of doing so being ascertainable, the amount of the surplus of the residue was also ascertainable, and was a valid bequest to the school.

Mr. Jessel and *Mr. Bury*, for the next of kin, contended that the surplus could not be possibly ascertained unless the void bequest were first carried into effect. The gift of the surplus was therefore void for uncertainty.

Mr. Southgate, *Mr. Edwin Cutler*, and *Mr. Sladen* for other parties.

The Master of the Rolls held that he must declare void the whole gift of the residue.

Stuart, V.C. June 26. } Mortlock *v.* Mortlock.

Forma pauperis, Suing in—Vexatious Conduct of Plaintiff—Bill taken off File, with Costs.

John Frederick Mortlock obtained liberty to sue in *formâ pauperis*, and filed this bill on the 10th instant as heir-at-law of his father, John Mortlock, praying for the appointment of a new trustee to complete the trusts of his father's will, that all the testator's estates might be deemed to be vested in such new trustee, for certain accounts, and that the defendant might pay the costs. The defendant obtained special leave to serve the following motion for this day:—'That the order dated June 10, 1869, made by the Master of the Rolls on the application of the plaintiff, whereby it was ordered that the plaintiff should be at liberty to prosecute this suit in *formâ pauperis* in person, might be discharged, and that the bill filed in this cause might be taken off the file of the Court, such bill being the fifth bill filed by the plaintiff for substantially the same object, and he having also brought ejectment to recover the estates sought to be recovered by him by his present and former bills, and the bill in this cause being wholly unjustifiable, improper, and vexatious; and the plaintiff having designedly and improperly omitted to mention or notice therein, as he had in his fourth filed bill, the fact of his bankruptcy, and having wholly suppressed in the bill in this cause the statement of many material deeds, although upon the hearing of his first bill he was told by the Master of the Rolls to the effect that he could have no case unless such deeds were set aside, and the omission of all reference to such deeds being an abuse of the indulgence of which he was availing himself of suing in *formâ pauperis*; and that the plaintiff might be ordered to pay the defendant's costs of this application and of this suit, or that such other order might be made as to the Court might seem meet.'

Mr. Dickenson and *Mr. Casson* for the defendant.

The Plaintiff in person.—The former bills were for a different object, and, moreover, never came to a hearing, but were defeated by demurrers; and this motion is irregular. There is no affidavit in support of it except one by the solicitors, which does not state all the facts. He was entitled to all the real estate, which did not pass under his father's will.

Stuart, V.C., said the conduct of the plaintiff was very vexatious, and ordered the bill to be taken off the file, with costs to be paid by the plaintiff.

Stuart, V.C. June 30. } Davidson *v.* Coats.

Will—Construction—Legacy of Given Sum to Each of a Class at a Future Period—Conversion.

John Coats devised all his real estate to trustees upon trust to sell the same, and to invest the produce in Government funds or other good security to be approved by the trustees, and after a bequest of a leasehold interest, bequeathed all the residue of his personal estate to the same trustees upon trust for sale, conversion, and investment in the same description of securities; and the testator declared that the trustees should stand possessed of all such securities for money as he would possess at his death, and 'all the Government funds or other securities purchased or taken by virtue of that his will,' upon trust to pay the dividends and interest to his wife for life, and after her decease to raise by sale or transfer of so much of the trust funds or securities as would be necessary to pay certain legacies to his nephews and nieces, which he thereby directed his trustees to pay; and amongst others the sum of 200*l.* 'to each of the sons of his brother, John Coats,' with a declaration that in case of the death of either of his said nephews and nieces in the lifetime of his wife the share or shares of him, her, or them so dying should go and be divided in equal shares among the survivors; and 'as to all the

residue of his personal estate after payment of the legacies,' upon trust for certain persons therein mentioned. The testator's wife and several of his nephews and nieces survived him, and, the widow having died, this suit was instituted to carry into execution the trusts of the will.

The principal question now argued was whether a son of the testator's brother, John Coats, who was born after the death of the testator, but in the life of his widow, took a legacy of 200*l.*, and whether the residuary gift of personal estate extended to the proceeds of the real estate, which had been sold by the trustees.

Mr. Dickenson and *Mr. W. W. Knox* appeared for the plaintiffs; and

Mr. Greene, *Mr. Karslake*, *Mr. Prendergast*, *Mr. Whitehouse*, *Mr. Edmund James*, and *Mr. Swan* for other parties.

STUART, V.C., was of opinion that the after-born son of John Coats was entitled to a legacy of 200*l.*, and that although the legacies were payable as well out of the proceeds of real estate as out of the personalty, the residuary gift did not comprise the proceeds of the real estate.

STUART, V.C. July 1. } JONES *v.* JONES.

Administration Suit—Infant Plaintiffs—Decree—Marriage of Next Friend—Revivor—Husband not Appointed to be the New Next Friend.

Mr. Bedwell moved in this case for an order to revive the suit, which had become abated, under the following circumstances:—The suit was for administration. The plaintiffs in it were five in number, of whom four were infants, and the fifth their sister and next friend. The usual administration decree had been made in the suit, and the next friend had since married. It was now asked that her husband might be appointed the new next friend of the infant plaintiffs. The registrar had objected to draw up the order.

Mr. Woodroffe appeared for the defendants, who were trustees and did not oppose the application.

STUART, V.C., declined to appoint the husband of the former next friend of the plaintiffs to act as their new one. In the existing condition of the authorities upon the question of reviving suits, he was anxious not to depart from the usual course of proceedings. Here, therefore, the plaintiffs must find some new next friend other than their sister's husband, and then revive the suit by making her and her husband co-defendants to it.

STUART, V.C. July 1. } CLIFF *v.* BULL.

Injunction—Notice of Motion for—Affidavit of Plaintiff in Support—Cross-Examination of Plaintiff—Refusal to Produce Documents inquired after—Production Enforced.

The object of this suit was to obtain an injunction to restrain the defendant from removing or interfering with certain water-pipes belonging to the plaintiff, or in which he was interested.

The plaintiff's bill was filed on May 11, 1869, and interrogatories to it were served on the defendant on May 21. The plaintiff then gave the defendant notice of a motion for an injunction, according to the prayer of the bill, and filed an affidavit in support of his motion. The affidavit set forth (*inter alia*) several documents which were in the possession of the plaintiff. An order having been made for the appointment of a special examiner in the cause, the defendant summoned the plaintiff before the examiner, to be cross-examined on his affidavit. The plaintiff attended, and in the course of his cross-examination was questioned as to a particular document, not one of those referred to in his affidavit, but one which was admitted by him to be in his custody. When asked to produce it he refused to do so, but did not otherwise object to the cross-examination. The examiner, however, expressed it to be his opinion that the plaintiff ought to produce the document. After some discussion it was arranged that the matter should be adjourned into Court. It now came on to be heard upon a motion for an order directing the plaintiff to produce the document at his own cost.

Mr. Dickinson and *Mr. Eddis* appeared for the defendant.

Mr. Alexander was for a party who had attended before the examiner, and who had been served by the principal defendant with notice of this motion.

Mr. Greene and *Mr. F. Nalder*, for the plaintiff, contended that no defendant could obtain an order for the production of documents by the plaintiff until he had put in a full and sufficient answer to the bill (15 & 16 Vict. c. 86, s. 20). Here the defendant had not yet answered the interrogatories served on him. The document in question would, if produced, introduce new matter into the suit. If the order now asked for were made, no plaintiff, seeking an injunction to protect his property, could ever venture to move for one before the cause came to a hearing, for he would be compellable to furnish the defendant with matter to support his case against him when the real merits of it came to be decided between them.

STUART, V.C., having in the course of the arguments observed that the question now at issue was whether he should hear the motion for the injunction upon proper or imperfect evidence, said it was no doubt the general rule of the Court that a defendant was not entitled to an order for the production by the plaintiff of documents before a full and sufficient answer had been put in to the bill. That, as a rule, was a just one, because a defendant ought not to be allowed to compel a plaintiff to furnish him with matter by which to shape his case for the hearing of the cause till he had properly answered the plaintiff's bill. The rule was, in some respects, not a useful one, because if the discovery which the defendant sought before answer was the same as that to which he would be clearly entitled after it, the only result was to protract unnecessarily the litigation between the parties. But the present case was not a motion by the defendant for the production by the plaintiff of documents in support of the defendant's case at the hearing. The plaintiff here, at a time when the defendant, although he had not answered the interrogatories, was in no way in default in his proceedings, was going, upon an interlocutory application before the hearing, to move for an injunction. He made an affidavit in support of his motion; and by the rules of the Court he might be—and he was—cross-examined on that affidavit. That cross-examination, and the defendant's right to take it, was not questioned; and the plaintiff did not object to discover any matters of parol testimony, or to produce the documents referred to in his affidavit. He only resisted the production of this particular document. But, if he were not ordered to produce it, the whole of the cross-exami-

nation would be in effect a nullity. Suppose the examiner had held the plaintiff's objection to be a good one, and had closed the cross-examination without the production of this document, the Court might, on the hearing of the motion for the injunction, have been deprived of evidence which would have then shown whether, upon all the facts of the case, the motion was one that ought to be entertained. The refusal on the part of the plaintiff to produce this document was a mistake, and he must pay the costs of this motion. The cross-examination must be concluded, and that would perhaps afford all the evidence that the parties might require. Such motions as these—upon mere points of practice—were much to be deprecated; and indeed Parliament had, in the recent legislation, done all it could to stop them by providing more speedy modes by which injunctions could be obtained.

Mr. Alexander asked for his client's costs of this motion.

Stuart, V.C., thought that the defendant, who had served him, ought to pay them; but did not otherwise vary the order, already stated, as to costs.

Stuart, V.C. June 29, 30. July 6. } Waterlow *v.* Sharp. Gardner *v.* Sharp.

The London, Chatham, and Dover Railway Company—The Company's Creditors—Priorities of—Motion to Vary Certificate as to, Refused—Costs.

This was a motion on behalf of the plaintiff Gardner. By the first schedule to the certificate, the chief clerk had stated that there was due from the London, Chatham, and Dover Railway Company to the London and County Banking Company, as a debt, a sum of 64,769*l.* 19*s.* 11*d.*, and he had allowed that debt accordingly. He had also certified that those creditors had guarantees from Sir Morton Peto, Bart., for 50,000*l.*, and 8,000*l.* City Line B shares of the London, Chatham, and Dover Company, and 5,000*l.* debenture mortgages, purporting to be charged on the Western Extension undertaking of the company. The general summary of the debts mentioned in the first schedule was as follows:—(1) Simple Contract Creditors, 470,549*l.* 5*s.*; (2) Common Fund Creditors, 36,874*l.* 18*s.* 2*d.*; (3) Western Extension Creditors, 14,159*l.* 17*s.* 11*d.*; (4) Land Claims, 119,702*l.* 13*s.* 10*d.*; (5) Costs, 3,052*l.* 7*s.* 11*d.*; (6) Claimants on Debentures, 2,269,942*l.* 12*s.* 2*d.*; (7) Non-claimants on Debentures, 2,277,424*l.* 11*s.* 4*d.*: Total, 5,192,156*l.* 6*s.* 4*d.* By the second schedule to the certificate, he had stated that there was due from the company to the holders of the Common Fund Stock the above sum of 36,874*l.* 18*s.* 2*d.*; and by the third schedule, that there was due to the holders of Western Extension Stock the above sum of 14,159*l.* 17*s.* 11*d.* The motion sought to vary the certificate in the following respects:—Whereas the chief clerk had also found that all the above debts in the first schedule ranked equally, and that there was no priority between or among them, it might be certified that the debts numbered 1, 4, 5, 6 and 7, ranked equally and in priority to debts 2 and 3; that whereas it had been stated that the above sum of 64,769*l.* 19*s.* 11*d.* was due to the London and County Banking Company, as creditors of the London, Chatham, and Dover Railway Company, it might be certified 'that that claim so made by the bank against the company might be allowed.' The motion also sought relief in respect of some other items in the above list, by reducing a sum of 8,985*l.* 13*s.* 9*d.*, due from the railway company to Messrs. John Penn & Son to a less amount, which was afterwards arranged at the sum of 3,065*l.* 19*s.* It appeared that the London and County Banking Company had allowed the railway company to overdraw their account with them to a fixed amount; and that the balances so from time to time overdrawn had been entered in the books of the bank, to an account entitled 'the loan account' of the railway company. The question was whether that was really a 'loan' within the borrowing powers conferred on the railway company by their various Acts (of which there were no fewer than thirty-seven), or any of them. It further appeared that the banking company had originally been permitted by this branch of the Court to prove for their balance; but on appeal to the Lords Justices, the order giving that permission was discharged, and the right to prove postponed till the amount of the balance had been duly ascertained and certified. That had been since done, and had resulted in the above-stated sum of 64,769*l.* 19*s.* 11*d.* All the debts specified in the schedules were debts due from the railway company at the date of the deed of arrangement of January 19, 1867, executed by the company for the benefit of its creditors. The rights of the several shareholders and others mentioned in the first schedule to the certificate to rank—(*a*) as creditors, and (*b*) as simple contract creditors only, or otherwise *inter se*, also depended on the construction of various clauses of the different Acts regulating the affairs of the railway company.

Mr. Dickinson and *Mr. Martineau* supported the motion.

Sir Roundell Palmer, Mr. Greene, Mr. Bristowe, Mr. Fry, Mr. Speed, Mr. Waller, Mr. Langworthy, Mr. J. N. Higgins, Mr. Bagshawe, Mr. Heming, Mr. Kekewich, Mr. Westlake, Mr. Stock and *Mr. Cookson* were for the several parties interested other than Mr. Gardner.

Stuart, V.C., refused to make an order varying the certificate, and directed the costs of the motion to be disposed of, with the hearing of the causes, on further consideration.

Stuart, V.C. July 6, 7. } Rose *v.* Rowe.

Will—Construction—Devise and Bequest to Widow of the Testator—Life Estate.

Joseph Swann, by his will dated Feb. 28, 1834, made the following devise and bequest:—

'I give to my dear wife, Ann Swann, the rents and interest of all my property whatsoever and wheresoever for her life, but still giving her the liberty to sell and dispose of the whole or any part of the said property if she shall think proper so to do; and what property remains at her death, my will is that the freehold and copyhold estates be then sold, if not sold before, and with all the other property remaining to be divided into two equal parts.' The testator then directed these two parts to be divided, the one into sixths, for six legatees named in the will, and the other part into thirds, for three legatees also named. The will contained directions as to survivorship between those nine legatees, in the event of any of them dying before receiving their shares. The testator died in 1843. His widow sold a portion of his estate, to enable her to lend 200*l.* That sum was, however, afterwards repaid, and placed by her, in her own name, on a deposit account with the London and County Bank. Ann Swann,

by her will, bequeathed the residue of her personal estate to two persons therein named, and appointed the defendant her executor. She died in October 1865. The principal question in the case was what interest Ann Swann took in her husband's property under his will.

Mr. Hallett appeared for the plaintiff in the suit.

Mr. E. K. Karslake and *Mr. A. E. Miller*, for the legal personal representative of the testator's widow, contended that under her husband's will she took an absolute interest in his property, with a power of selling or disposing of it in any way she chose, and that the gift over in the will only operated upon so much of the property as she had not, by deed, will, or otherwise, dealt with.

Mr. Renshaw, *Mr. Heming*, and *Mr. Hallett, jun.*, were for other parties.

STUART, V.C., held that the widow of the testator took, under his will, a life estate only in his property, and that on her death it must be divided among the legatees thereof named in his will.

STUART, V.C. July 7. } ROBINSON *v.* WOOD.

Debtor and Creditor—Warrant of Attorney—Interest on Loan at 5l. per Cent. per Month—Reduction of Rate after a Certain Day to 4l. per Cent. per Annum.

In this suit, which was instituted for the administration of the estate of a testator, it appeared that he had given to a Mr. Robert Cook a warrant of attorney, in the following terms:—

'The within warrant of attorney is given to secure the payment of the sum of 1,330*l.*, with interest thereon at and after the rate of 5*l.* per cent. per month, on June 2 next, judgment to be entered up forthwith; and in case of default of payment of the said sum of 1,330*l.* and interest thereon on the day aforesaid, execution or executions and other process may then issue for the said sum of 1,330*l.* and interest, with costs of entering up judgment, &c. Dated May 2, 1864.'

No judgment was ever entered up in pursuance of that warrant. It was said by the executors of the testator that there was no agreement shown by the warrant to pay interest at 60*l.* per cent. beyond June 2, 1864, that there was no other evidence of the contract between the parties as to the interest than what was afforded by the warrant, and that by 1 & 2 Vict. c. 110 it ought to be calculated at the rate of 4*l.* per cent. per annum only. The chief clerk had, however, certified that there was due in February, 1866, from the estate of the testator to Mr. Cook, for interest then unpaid in respect of the 1,330*l.*, the sum of 2,100*l.* and odd, being after the rate of 60*l.* per cent. per annum to that date. The cause now came to be heard on a motion to vary the certificate by calculating the interest since June 2, 1864, after the rate of 4*l.* per cent. per annum only.

Mr. Greene and *Mr. Wood*, for the executors of the testator, supported the motion.

Mr. Dickinson and *Mr. F. H. Daly*, for Mr. Cook, contended that the contract to pay interest on the 1,330*l.* until satisfaction, was, according to the proper construction of the warrant, after the rate of 5*l.* per cent. per month; that that contract was one which could now be entered into, and that the certificate was therefore correct.

Mr. H. F. Bristowe and *Mr. Bagshawe* for the plaintiff in the suit; and

Mr. Fischer was for other parties.

STUART, V.C., held that the interest payable in respect of the 1,330*l.* after June 2, 1864, must be calculated after the rate of 4*l.* per cent. per annum only, and that the certificate must be varied accordingly.

MALINS, V.C. June 24, 29. } LLEWELLYN *v.* ROSE.

Will—Charities, Residuary Bequest to—Pure and Impure Personalty—Marshalling Legacies.

A question arose upon the further consideration of this case as to the marshalling of certain charitable bequests contained in the will of Mary Billinge. After providing for the payment of her debts, the testatrix gave a legacy of 200*l.* to the Liverpool Infirmary, and other pecuniary legacies amounting to about 1,200*l.*

She then gave all the residue of her estate equally between the Bluecoat School Hospital, the Asylum for Orphan Girls, and the Asylum for Orphan Boys at Liverpool, with a direction 'that the several charitable bequests given by her will should be paid out of such parts of her personal estate only as were by law applicable to bequests of that nature.'

The estate consisted of about 4,000*l.*, of which about 3,000*l.* was pure personalty.

Mr. Fooks and *Mr. Villiers* for the trustees.

Mr. Cotton, *Mr. Bardswell*, and *Mr. R. Roberts*, for the several charities claiming under the residuary bequest, argued that the direction in the will indicated an intention that all the impure personalty was to be exhausted in the payment of the general pecuniary legacies before resorting to the pure personalty, in order that the residue of pure personalty to be divided between the charities might be as large as possible.

Mr. L. Field for the Liverpool Infirmary.

Mr. Osborne and *Mr. C. Hall*, for the next of kin, submitted that the pecuniary legacies (other than that to the Liverpool Infirmary) ought to be paid rateably out of the pure and impure personalty, in which case any residue of the impure personalty would go to the next of kin.

MALINS, V.C., directed that the legacy of 200*l.* to the infirmary should first be paid out of the pure personalty, and subject thereto, the remaining legacies should be paid out of a general fund constituted rateably of the pure and impure personalty. The residue would then be distributable, so far as it was pure, between the three charities mentioned in the residuary bequest, and so far as it was impure, between the next of kin as indisposed of. His HONOUR thought the direction contained in the will as to the mode of payment was inoperative and nugatory, it being impossible to treat any part of the personalty as residue until the debts and other legacies had been fully satisfied.

MALINS, V.C. June 29. } PUGH *v.* ARTON.

Landlord and Tenant—Fixtures—Right to Remove—Forfeiture of Lease—Re-entry.

Plaintiff was landlord of a shop and premises at Worcester, which had been demised to John Vaughan for seven years from March 25, 1865. Among other provisions, the lease contained a proviso that if the lessee should become bankrupt, or execute any assignment for the benefit of his creditors, the lessor should have power to re-enter and take possession.

On March 2, 1866, Vaughan assigned all his estate

and effects to the defendant for the benefit of his creditors; the deed was registered in bankruptcy on March 11; on the 12th plaintiff gave notice to determine the lease under the forfeiture, and on the 14th he claimed formal possession of the premises, including certain trade fixtures which defendant had advertised for sale under the deed of assignment as being tenant's fixtures, and belonging to Vaughan the lessee.

This bill was filed to restrain the sale, and the question was whether the tenant's right to remove the fixtures was barred by the re-entry.

Mr. Glasse and *Mr. Elderton*, for the plaintiff, referred to Woodfall's 'Landlord and Tenant,' last edition, p. 534.

Mr. J. Pearson and *Mr. Hadley*, for the defendant, cited *Sumner* v. *Broomilow*, 34 Law J. Rep. (N.S.) Q.B. 130, and contended that the tenant was entitled to have a reasonable time for the removal of his fixtures.

Malins, V.C., referred to *Lyde* v. *Russell*, 1 B. & Ad. 394, and observed that the law, as there settled, remained unaltered. In the absence of any special reservation the fixtures became the property of the landlord, unless removed by the tenant while he was in lawful possession. It mattered not whether the lease was determined by effluxion of time or by forfeiture. This strict rule might be varied, as in the case cited, by special contract between the parties; but in the present case there was no such contract. By the act of bankruptcy there was an absolute forfeiture of the lease, and after the landlord's re-entry under the forfeiture the tenant had no longer any right to remove his fixtures. The plaintiff, therefore, was entitled to a decree; but as the claim was harsh and ungracious, there would be no costs.

Malins, V.C. June 30. } Ramshire *v.* Bolton.

Bill of Exchange—Money Advanced on Security of—Misrepresentation—Concurrent Jurisdiction.

Demurrer. The bill stated that the defendant had represented to the plaintiff that he was entitled to a moiety of the proceeds of a bill of exchange for 500*l.*, to which R. and L. were parties, and that the said R. and L. were both in solvent circumstances; that on the faith of these representations plaintiff had advanced to defendant a sum of 237*l.*; that the said bill, having been obtained without consideration, was worthless and void, and had been dishonoured at maturity; that the said R. and L. were neither of them solvent; and that these facts were within the knowledge of the defendant when he made the above representations. The plaintiff accordingly prayed that the defendant might be ordered to repay the money so advanced as aforesaid.

Mr. Glasse and *Mr. Cottrell*, for the defendant, demurred. This is a mere money demand, and the proper subject for an action at law.

Mr. Everitt for the plaintiff.

The Vice-Chancellor said that taking the charges and allegations as true upon demurrer, they showed a sufficient case of fraud for the interference of the Court. As to the objection that the proper remedy was at law, this Court had concurrent jurisdiction in all cases of fraud and misrepresentation, which would not be ousted even if it could be shown that there were good grounds for a criminal prosecution for obtaining money under false pretences.

Demurrer overruled.

Malins, V.C. July 2. } Stuart *v.* Cockerell.

Bankruptcy—Fund in Court—Stop-Order—Notice Charge.

Sir Simeon Stuart having a life interest in a certain fund in Court, mortgaged it, and subsequently, in 1860, became a bankrupt; in January, 1868, the dividends on the fund were in arrear to the amount of 120*l.*; in November, 1868, he died. The mortgagees omitted to get a stop-order upon the fund previous to the bankruptcy, but got one after that date, and now petitioned to have the arrears paid to them. The assignees in bankruptcy opposed.

Mr. W. W. Karslake for the petitioners: The assignees in bankruptcy should have obtained a stop-order themselves if they wanted to take advantage of our laches in not doing so. As they did not, the defect was cured in time by our obtaining the order. *Grainge* v. *Warner*, 6 N. R. 219.

Mr. Woodroffe for the assignees: These arrears were in the order and disposition of the bankrupt, and therefore accrue to us by statute. It is unheard of that assignees in bankruptcy must get a stop-order to perfect their title.

The Vice-Chancellor said the case was clear. No notice was given of the mortgage previous to the bankruptcy, and the stop-order obtained afterwards was too late. *Grainge* v. *Warner* was inconsistent with other cases and with the practice of the Court. The assignees in bankruptcy were entitled to these dividends.

Malins, V.C. July 2. } Ross *v.* Tatham.

Will—Liability of Executor for Breach of Covenant by Testator—Creditor's Claim—Lord St. Leonard's Act (22 & 23 *Vict. c.* 35).

Testator was lessee of certain land under a lease, dated 1861, in which he had covenanted to expend 1,850*l.* within the ensuing twelve months in building. He was, however, restrained from building by injunction of this Court in the suit of *Weatherley* v. *Ross*, and the covenant was thus broken. In 1863 the testator died, and in 1864 an administration suit was commenced, in the course of which the usual advertisements for creditors were issued; no claim was then made by the landlord on account of the above breach of covenant. This was a petition by parties beneficially entitled to part of the estate for payment out of Court.

Mr. Owen for the petition.

Mr. Wickens, for the executors, objected to the fund being taken out of Court until a sufficient part thereof had been set aside to indemnify them against any claims of the landlord on account of the breach of covenant. He contended that the executors could not claim the benefit of section 27 of Lord St. Leonard's Act (22 & 23 Vict. c. 35) until they had set aside a sum to meet the liability. This was a continuing covenant, and the breach of it was therefore a future as well as an accrued claim. The damages being unliquidated, the creditor could not have brought in a claim for them.

Mr. Romer for testator's widow, who had a life interest in a moiety of the residue.—This moiety must remain in Court, and will consequently be subject to any claims of the landlord on account of the breach of covenant. The widow is therefore entitled to see that the executors are sufficiently indemnified.

The VICE-CHANCELLOR said that, if the landlord had any claim in respect of this breach of covenant, he should have brought it in against the estate when the advertisements were issued. Having omitted to do so, he lost his remedy against the executors, though not against the estate; he was thrown on the assets, and must follow them as best he could. Again, even if this was a continuing covenant, the decree of the Court would protect the executors. He did not base his decision on Lord St. Leonard's Act, but quite independently of it; he was of opinion that the executors were not now liable to any claim in respect of which they could require a fund to be set aside.

JAMES, V.C. June 28. } COOPER *v.* COOPER.

Power of Appointment—Fraud—Bargain with Appointee by which Appointor took an Interest—Appointment Supported.

By the marriage settlement of Mr. and Mrs. Thomas Daniell, dated September 8, 1806, a fund of stock was vested in trustees upon trust, after the death of the survivor of Mr. and Mrs. Daniell, for such of the children of the marriage as Mr. and Mrs. Daniell jointly, or the survivor of them, should appoint, and in default of appointment, for the children of the marriage equally, sons at twenty-one, daughters at twenty-one or on marriage. There were five children of the marriage. One of such children, Maria Gertrude, on February 14, 1832, married G. O. B. Trevanion. By articles of agreement made in contemplation of such marriage Daniell covenanted to execute to certain trustees a bond to secure payment in 1840 of a sum of 4,567*l.*, with interest at 5 per cent., and he also covenanted for himself and his wife that they would execute a valid appointment of one-fourth of the moneys comprised in their said marriage settlement in favour of their daughter Maria Gertrude Daniell, to be settled upon the trusts therein mentioned, and it was declared that the moneys received under the bond and the appointment should be settled upon trust for G. O. B. Trevanion for life, with remainder to Maria Gertrude Trevanion for life, with remainder to the children of their marriage as therein mentioned; and in case there should be no children, then that the funds settled by Mr. and Mrs. Daniell should go to the executors, administrators, and assigns of Thomas Daniell. Accordingly in April a bond was executed by Daniell to secure the above-mentioned amount to the trustees of his daughter's settlement, and an apportionment of one-fourth of about 12,000*l.* Consols and 7,500*l.* sterling, being the funds subject to the trusts of the settlement of 1806, was made by Mr. and Mrs. Daniell. An indenture of settlement in pursuance of the said articles was executed on April 11, containing an ultimate limitation in default of children of the marriage of Mr. and Mrs. Trevanion to Thomas Daniell. G. O. B. Trevanion died in September, 1832, and there was no issue of his marriage. In June, 1841, Trevanion's widow married the plaintiff. In April, 1885, Thomas Daniell was adjudicated a bankrupt. Till his bankruptcy Mrs. Trevanion had duly received the interest due on the bond, and under the bankruptcy above 900*l.* of the principal sum secured by the bond had been realised and paid to her trustees. In May, 1849, Thomas Daniell's reversionary interest in the settled fund was assigned for value to trustees of the Economic Life Assurance Society.

This bill was filed by the second husband of Maria Gertrude Daniell, impeaching the appointment made in her favour as aforesaid, upon the ground of fraud.

Mr. Kay and *Mr. W. C. Druce* for the plaintiff.

Mr. Hemming (*Sir R. Palmer* with him) for Sir A. Duff Gordon, the trustee of the Economic Society.

Mr. Eddis, *Mr. Hamilton Humphreys*, *Mr. Fischer*, *Mr. Deverell*, and *Mr. Swann* for the other defendants.

JAMES, V.C., said the plaintiff's case was an illustration of the class of cases in which the rules laid down by the Court of Chancery were endeavoured to be strained. It had been urged that the power had been exercised for a corrupt and sinister purpose, and with the object of giving an advantage, however remote, to the donee of the power. But Mr. Daniell, besides exercising the power, also bound himself by bond to pay, for the benefit of his daughter, a sum nearly equivalent to the amount appointed in her favour. The trustees of the daughter's settlement had received the interest under this bond for years, and a considerable sum out of the capital secured by it had been realised under the father's bankruptcy. The bargain was substantially for the benefit of the daughter. The father gave over and over again the value of the contingent interest reserved to him. The present plaintiff, who had taken all the advantages under the bargain, could not now come to set it aside; but beyond that he based his judgment on the broad principle that there had been no corrupt, improper, or sinister purpose in the father's appointment, and this bill must be dismissed with costs.

JAMES, V.C. June 29. } BARNES *v.* WOOD.

Vendor and Purchaser—Specific Performance—Feme Covert—Agreement by Husband having a Limited Interest in Lands.

Certain messuages and land in Yorkshire stood limited, subject to a mortgage in fee thereon, to John Stringer and his heirs, for the life of Harriet Whitehead, with remainder to the use of John Stringer and Betty, his wife, in her right in fee simple. John Stringer, in the event of his surviving his wife, and of the remainder in fee becoming vested in possession during the coverture, would also be entitled to the premises for his life by the curtesy.

In February 1868, John Stringer entered into and signed an agreement in writing for the sale of the property to the plaintiff for 710*l.*, and the plaintiff paid a deposit of 50*l.* upon the purchase money. Subsequently, in March 1868, the plaintiff for the first time learnt of Betty Stringer's interest in the property, and thereupon he required her concurrence and the acknowledgment by her of the conveyance. This was not obtained; but on April 25 Stringer returned the 50*l.* deposit to the plaintiff. On April 22 John Stringer and his wife had entered into an agreement in writing with the defendant for the sale to him of the same property for 710*l.*, and on April 25 they executed a conveyance to the defendant, which was duly acknowledged by Mrs. Stringer. The plaintiff then filed his bill, alleging that the sale to the defendant had been made collusively, and with a fraudulent knowledge of the plaintiff's previous contract, and seeking a declaration that the conveyance to the defendant was subject to and bound by the plaintiff's contract, and praying for a conveyance from him

of either the fee simple or the interest of John Stringer therein.

The defendant denied any fraud or collusion.

Mr. Amphlett and *Mr. Bagshawe* for the plaintiff.

Mr. Kay and *Mr. G. Williamson* for the defendant.

James, V.C., held that John Stringer had been bound by his contract with the plaintiff to the extent of his interest in the property, and there must be a decree against the defendant for the conveyance of that interest to the plaintiff, and a reference to Chambers to ascertain the amount of compensation to be paid to the plaintiff for the wife's interest not conveyed to him.

James, V.C.
June 28, 29, 30.
July 2, 5.

Joint-Stock Discount Company (Lim.) *v.* Brown.

Directors' Liability—Breach of Trust—Concurrence after Protest—Signing Cheques by Way of Conformity.

The bill filed in 1866 by the above company by their official liquidator against their late directors, secretary, and assistant manager, sought to impeach a transaction whereby the directors had accepted on behalf of the company, in the names of some of themselves as nominees, first 3,000 shares, and then 500 more by way of bonus, in Barned's Banking Company (Lim.), and had given to such nominees a letter of guarantee or indemnity against their liabilities in respect of such shares, and had some of them signed cheques for sums amounting in the whole to 30,000*l.* in payment of deposits and calls thereon. A demurrer having been overruled by Lord Hatherley (then Wood, V.C.), in November, 1866 (reported L. R. 3 Eq. 139), the case now came on upon motion for decree. The Court held (June 29), that the transaction was *ultra vires*, and the appropriation of the company's money a breach of trust; and the question now to be decided was, whether all or any, and which of the directors were personally liable for such breach of trust. The only cases argued were those of—(1) Gillespie, a director, who had attended no meeting at which anything was done in the matter, and had signed none of the cheques: (2) Brown, who had acted as chairman of the board meeting at which the original resolution to apply for the shares was passed, but had afterwards written a letter of protest against the acceptance of the terms ultimately offered by Barned & Co.; the fact of which letter having been read at the next meeting was entered in the minute-book, but nothing to show the purport of it. He had not, however, repeated his protest, had attended subsequent meetings, and had accepted some of the 500 bonus shares as a nominee of the company: (3) Bravo, a director, who had not become such till after the shares had been accepted, but had since signed a cheque for 5,000*l.*, as he said, for the sake of conformity, and without knowing what the payment was for (by the rules of the company, all cheques were required to be signed by the managing director and one other director): (4) the assistant manager and the secretary of the company.

Mr. Little and *Mr. L. Webb* for the plaintiffs.

Sir R. Palmer, Mr. Kay, and *Mr. Hemming* for Brown.

Mr. Jessel and *Mr. Robinson* for Bravo.

Mr. H. M. Jackson for Gillespie.

Mr. Amphlett and *Mr. Kekewich* for the secretary.

Mr. E. K. Karslake and *Mr. Fooks* for the assistant manager.

Mr. Willcock, Mr. Eddis, Mr. Cracknall, Mr. G. W. Lawrance, and *Mr. Westlake* were for the other defendants respectively.

James, V.C., after remarking that the evidence now produced had set the transaction in even a less favourable light than it appeared on the demurrer, said that as regarded Gillespie there was no proof of concurrence or connivance, and therefore the bill must be dismissed against him, but without costs, because a director ought not to be able to say 'I knew I was a director, but I did nothing, taking for granted that it was all right.' As to Brown, his story was simply a naïve confession of dereliction of duty. It was his duty, if necessary, even to file a bill against his co-directors; but, in fact, he could at any time have stopped the transaction by threatening to send a circular to all the shareholders on the subject. There was, therefore, no pretence for releasing him from his liability. He had been startled by the defendant Bravo's defence, that he had signed the cheque as a mere ministerial act; the rule requiring the signature of two directors clearly assumed that a director signing would take care to inform himself as to the authority under which the cheque was brought to him. For the other directors no excuse had been even suggested. As for the secretary and assistant manager, considering their awkward position as servants, nominally, indeed, of the company, but directly of the masters whom the company had set over them, he should dismiss the bill as against them, but without costs. The letter would not be cancelled, as it might be a useful weapon in the hands of the company against other parties; but there would be a declaration that it did not amount to a guarantee by the company, and that the appropriation of the 30,000*l.* was a breach of trust by all the directors except Gillespie.

Courts of Common Law.

Queen's Bench.
June 25.

Cummings *v.* Heard.

Pleading—Arbitration and Award—Estoppel.

In a declaration containing the common money counts the defendant pleaded—(3) As to 145*l.* a set-off; (4) By way of estoppel as to the causes of action, except as to the said sum of 145*l.*, that after the accrual of the causes of action and before suit, the plaintiff and the defendant having disputes as to the amount due to the plaintiff, in respect of the action agreed to refer the question to the arbitration of W. H., and that they

should be bound by his award; that he made his award, by which he found that the sum due to the plaintiff was 145*l.* 3*s.* 1*d.*

Demurrer and joinder in demurrer.

Anstie in support of the demurrer (June 24).

Jelf contra.

Cur. adv. vult.

The judgment of the COURT (LUSH, J., and HAYES, J.) was now delivered by LUSH, J. The plaintiff is precluded from alleging that more than the 145*l.* is due, for the award is binding as to all the matters it professes to deal with. Although the plea is pleaded by way of estoppel, it is in fact a bar, and is a good plea.

Judgment for the defendant.

Queen's Bench. July 8. } PLAYFORD *v.* THE UNITED KINGDOM TELEGRAPH COMPANY (LIM.).

Telegraphic Message—Property in—Privity of Contract—Mistake in Message—Action by Receiver of Message.

The plaintiff, having a cargo of ice at Grimsby, telegraphed to R. & H. at Hull for an offer for the cargo. They sent to the office of the defendants, a telegraph company, a message to the plaintiff by which they offered to take the cargo at 23*s.* a ton. In reading off the message in London a mistake was made, and the telegram sent to the plaintiff represented the offer as being for 27*s.*, which was accepted by the plaintiff, who thereupon sent the ship to Hull. R. & H. refused to receive the cargo except at 28*s.* per ton, and the plaintiff brought an action against the defendants to recover damages for the injury he had sustained by reason of the mistake.

Littler argued on behalf of the plaintiff (April 20).

C. Pollock (*A. L. Smith* with him) for the defendants.

Cur. adv. vult.

The judgment of the COURT (COCKBURN, C.J., LUSH, J., and HAYES, J.) was now delivered by LUSH, J.—The only question which need be considered is this—With whom was the contract made? To this there can be but one answer. It was made with R. & H., who sent the answer on their own account and in their own interest. They were not the agents of the plaintiff, neither did they represent him. The plaintiff was therefore a stranger to the contract, and cannot maintain an action for the breach of it.

Judgment for the defendants.

Queen's Bench. July 3. } DENSTON (ASSIGNEE OF HORWOOD) *v.* ASHTON.

Security for Costs—Plaintiff Assignee of a Bankrupt—Ejectment.

Rule to set aside an order of WILLES, J., ordering the plaintiff to give security for costs.

The plaintiff was assignee of Horwood, a bankrupt, and had brought this action of ejectment to recover premises formerly occupied by the bankrupt, and claimed by the plaintiff for the benefit of the estate. It was alleged that the plaintiff was very poor, and unable to pay costs.

M. Bere showed cause against the rule (April 22).

Day supported the rule.

Cur. adv. vult.

HAYES, J., now delivered the judgment of the COURT (COCKBURN, C.J., HANNEN, J., and HAYES, J.).—A duty was thrown upon the plaintiff to collect the assets for the benefit of the estate, and we think that he cannot be required to give security for the costs.

Rule absolute.

Queen's Bench. July 3. } POOLE *v.* WILLATS.

Composition Deed—Bill of Exchange—Indorsee—Acceptor.

Declaration by indorsee of a bill of exchange against acceptor.

Plea of a composition deed registered under the statute. The plaintiff replied that the bill was accepted for value, and indorsed to him for value, and that if he had assented to the deed he would have discharged the drawers.

Rejoinder that before the registration of the deed the drawers consented to the plaintiff executing and becoming bound by the deed.

Issue was joined upon this allegation, and was found in favour of the defendant.

The plaintiff then obtained a rule for judgment *non obstante veredicto*, on the ground that as the deed did not reserve his rights against the drawers, he was not on equal terms with the other creditors, and that the consent of the sureties to the composition did not remove the inequality.

Pearce showed cause against the rule (Nov. 23).

Murphy supported it.

Cur. adv. vult.

LUSH, J., now delivered the judgment of the COURT (COCKBURN, C.J., LUSH, J., and HANNEN, J.)—The deed is good on the face of it. We cannot assume that there were any creditors with sureties, other than the plaintiff; the *primâ facie* inequality which would, as regards him, have vitiated the deed, is met by the rejoinder, and removed by the facts alleged therein, and therefore the rule for judgment *non obstante veredicto* must be discharged.

Rule discharged.

Queen's Bench. July 3. } STRINGER *v.* THE ENGLISH AND SCOTTISH MARINE INSURANCE CO. (LIM.)

Marine Insurance—Goods—Seizure at Sea—Prize Court—Order for Sale of Goods—Notice of Abandonment—Total or Partial Loss.

This was a special case. Goods on board a ship were insured by the plaintiff with the defendants, for a voyage from Liverpool to Matamoras, against the usual perils, including 'takings at sea, arrests, restraints, and detainments of all things, princes, and people.' The policy contained a suing and labouring clause. The ship sailed, and on November 5, 1863, was captured by a cruiser of the United States, and carried into New Orleans. The captors instituted a suit in the Prize Court, in which judgment was obtained by the assured, they having contested the right to seize the goods, and having elected to treat it as a partial loss. On July 1, the captors appealed against the judgment, whereupon the assured gave notice of abandonment, which the assurers refused to accept. Endeavours were made to sell the ship and cargo, and the assured informed the defendants, the assurers, and called upon them to assist in preventing the sale by giving bail. They declined to do so. On May 24, 1864, the Prize Court ordered that the goods should be sold, and this was done on the 25th. The assured then gave a fresh notice of abandonment.

The question was whether the plaintiffs could recover as for a total loss.

Mellish (*W. Williams* with him) for the plaintiff (June 8).

Sir G. Honyman (*Kemplay* and *Cohen* with him) for the defendants.

Cur. adv. vult.

BLACKBURN, J., now delivered the judgment of the COURT (COCKBURN, C.J., BLACKBURN, J., LUSH, J., and MELLOR, J.)—We draw the inference of fact that the sale of the goods might have been prevented by depositing the full value, or by giving bail for them, and that the assurers had full opportunity for taking either of those steps, but declined to do so. We think that the assured was not in default, because he was not bound as a prudent owner to deposit the value or to put in bail, and he is entitled to recover as for a total loss.

Judgment accordingly.

Queen's Bench.
(Magistrate's Case.)
July 8.

FARRER (APPELLANT), CLOSE (RESPONDENT).

Friendly Societies—18 & 19 *Vict. c.* 63, *s.* 24—*Trades Unions.*

Case stated by justices under 20 & 21 Vict. c. 43.

Under section 24 of 18 & 19 Vict. c. 63, an information was laid by the appellant, the treasurer of the Amalgamated Society of Carpenters and Joiners, against the respondent, the branch secretary of the society, charging that he, then being an officer of a friendly society, and having in his possession 40*l.* belonging to the said society, had wilfully misapplied the same, contrary, &c.

It was contended at the hearing, on behalf of the respondent, that the society was not a friendly society within section 44 of the above Act; that it was a society established for purposes which are illegal, being against public policy and in restraint of trade; and that the society was an organisation for, or tending to the encouraging and maintaining of strikes.

The rules of the society were produced.

By rule 18, s. 6, 'Any officer being discharged from employment for holding office, if he sign the vacant book each day, he shall be paid at the rate of wages he was receiving when discharged, such remuneration to continue till he receive employment.'

Section 7.—'Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the Branch or Executive Council shall be entitled to the sum of 15*s.* per week.'

Section 9.—'Any member refusing work from private objections, unless he can show sufficient reason to a committee of a majority of the members at the next branch meeting, shall be suspended from donation until after he has been employed.'

Rule 25, s. 2.—'In the event of an application to the Executive Council from other trades for assistance, the secretary shall obtain information respecting the same, and on the Executive Council being satisfied as to the genuineness of the case, shall grant such assistance as the state of the funds warrant, or the case may, in their opinion, deserve.'

Rule 31, s. 1.—'There shall be an equalisation every twelve months (ending with the last meeting-night in December) of that portion of the funds of the society which has not been personally invested, such equalisation to be in proportion to the number of members in each branch.'

The case contained a large amount of evidence, of which it is here necessary to set out the following, which was given by the appellant:—

'If masters or men do not observe rules, in either case notice is sent to the masters' or men's association. Suppose masters' associations censure by any master offending, the men might be drawn away from that shop and paid by our society. In case of sickness 12*s.* per week is allowed. When drawn out of shop or turned off for being member of society, full wages or 15*s.* is allowed. In case twenty men drawn out and any went back, the society would take no steps. We correspond with branch associations in other towns. In case of a strike at Davenport, we should not consider the propriety of whether we should send or not, if the Branch Committee, with sanction of Executive Committee, had approved of a donation being sent.

'In case of long strike there and funds exhausted, we should not contribute except annually to an equalisation fund.

'We only consider subjects which affect our own Bradford branch; I don't know what money has been paid out of our society to any other society. We have monthly reports. Strikes are reported. Members of our society would not be allowed to go to places where there are strikes if we can prevent them. We would give a member 2*l.* or 3*l.* to send him somewhere else—*i. e.*, if he were out of work at Bradford, rather than a man should go to Keighley (if a strike was on), we would grant money to send him away a thousand miles another way. We can pay this money at our discretion. We should send men to Halifax or Leeds, pay their railway fares and keep them on, if it should be a case satisfactory to the branch. I don't know, nor never heard a word, about money being given to plasterers.

'We have given to Ex-Council 40*l.* or 50*l.* in two or three years. The Executive Council consider appeals if they come from other quarters; they send a remittance to branch carpenters' associations; they have also considered appeals from other trades—it may be to assist men on strike. The Executive Council can give money to strikes on any trades. Any sensible man can see from our monthly report where there are strikes and where to avoid. In the quarterly report trade privileges are mentioned. Wilson's men lost tools by fire; we brought them new tools. If I am out on strike, or we draw men out, and money is paid to me, or them, by the society, all such payments are trade privileges and justified by rules of the society.'

The case was argued (Jan. 16) by

Quain for the appellant.

No counsel appeared for the respondent.

Cur. adv. vult.

COCKBURN, C.J., now delivered the judgment of himself and MELLOR, J.—We think that the justices were right in dismissing the information. When the purposes of the society are gathered from the evidence as well as from the rules, it seems to us that this society, one of the purposes of which is the support of members upon strike, comes within the rule laid down in *Hornby* v. *Close*, Law Rep. 2 Q.B. 153; 36 Law J. Rep. M.C. 43, and is not a society established for a purpose which is not illegal, as required by section 44 of 18 & 19 Vict. c. 66. That being so, they have no right to prefer an information under section 24, and the justices were correct in their decision.

HANNEN, J., and HAYES, J., severally delivered judgment to the effect that the society was not shown to be established for an illegal purpose, and therefore that the justices were wrong in dismissing the information.

The COURT being equally divided, the

Judgment was entered for the respondent.

Common Pleas. June 26. } ROBERTS *v.* THE BURY IMPROVEMENT COMMISSIONERS.

Contract, Construction of—Right to Determine Contract—Opinion of Architect Binding.

Action on a builder's contract for preventing the plaintiff, the contractor, from completing the performance of the work he had thereby contracted to do to a cemetery for the defendants, a district burial board, for a specific sum. The contract was subject to various conditions, by one of which—viz., No. 4—the architect had power to give such further drawings and instructions as might appear to him proper for the contractor's guidance, and also to order further works. By another of the conditions—viz., No. 24—it was provided that if, by reason of any additions to the works, or for any other cause arising with the burial board or the architect, or for want of any drawings or directions, the contractor should, in the opinion of the architect, have been unduly delayed or impeded in the completion of his contract, it should be lawful for the said architect to grant, by writing under his hand, such extension of time as to him might seem reasonable. And by another of the conditions—viz., No. 27—it was provided that it should be lawful for the burial board, in case the contractor should 'fail in the due performance of any part of his undertaking,' or should become bankrupt or compound with his creditors, or should 'not, in the opinion and according to the determination of the said architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid, to determine the contract by a notice in writing under the hand of the clerk of the burial board, and to enter upon and take possession of the said works,' &c.

Upon demurrers to replications and rejoinder, which were argued by

Manisty (*R. G. Williams* with him) for the plaintiff,

Holker (*C. Russell* with him) for the defendants,

The COURT (WILLES, J., and MONTAGUE SMITH, J.) held that if, in the opinion of the said architect, the plaintiff did not exercise due diligence and make such due progress as would have enabled the works to be completed at the time provided by the contract, the defendants were entitled to determine the contract by notice according to condition No. 24, and that it was no objection to their doing so that the plaintiff had been prevented from making such progress by delay on the part of the defendants in supplying him with the necessary plans, and in defining the roads which had to be made; for these would be matters which the architect would have to take into consideration before he determined the plaintiff had not exercised due diligence and had not made due progress; neither, in the absence of fraud on the part of the architect, and collusion with him and the defendants, was it any answer to the defendants' right to determine the contract that the plaintiff was in fact, and in the opinion of the architect, unduly delayed in the completion of the contract by the causes stated in condition No. 24, and was therefore entitled to an extension of time, although the architect neglected to grant any extension of time. The Court considered that, by condition 27, the plaintiff had left the question of failure to make due progress to be determined, not by the facts, but by the opinion only of the architect, and that that opinion could not be reviewed by the Court or a jury.

Judgment for defendants.

Common Pleas. May 31, June 7, July 5. } FOSTER *v.* MACKINNON.

Bills and Notes—Signature of an Indorser when not Intended to be that of an Indorser.

The defendant, who was far advanced in years, put his signature on the back of a bill of exchange, in the belief that he was signing a guarantee and not a bill. In an action on the bill by a *bona fide* indorsee for value against the defendant as indorser, BOVILL, C.J., told the jury that, if the defendant's signature was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict.

The jury found for the defendant, and a rule *nisi* was obtained for a new trial on the ground of misdirection, and of the verdict being against the evidence.

Ballantine (*Serjeant*), *J. Brown*, and *Archibald* showed cause.

The *Solicitor-General* and *Sir G. Honyman* in support of the rule.

Cur. adv. vult.

BYLES, J., now delivered the judgment of the Court to the effect that the direction of BOVILL, C.J., was right, but that upon the question as to the verdict being against the evidence there ought to be a new trial.

Rule absolute accordingly.

Common Pleas. April 26, July 5. } MORRIS *v.* OGDEN.

Clergy—Church Discipline Act, 3 & 4 *Vict. c.* 86—*Sentence of Suspension—Right of Suspended Incumbent to Sue for Profits of Benefice.*

The question in this case was whether the plaintiff as incumbent of St. Peter's, Ashton, within the diocese of the Bishop of Manchester, could sue the defendant, who had been appointed to, and was actually in possession of the living, for the profits of the incumbency. The plaintiff, who had been duly appointed such incumbent, had been suspended *ab officio et a beneficio* for three years from December 15, 1861, by a decree pronounced in proceedings taken against him under the Church Discipline Act, and by the decree it was declared that such suspension should not be taken off until he should produce a certificate to the bishop's satisfaction, signed by three neighbouring beneficed clergymen of the diocese, of the plaintiff's good conduct during the said period of suspension. This condition the plaintiff could not ever strictly comply with. After the sentence had been pronounced a sequestration of the profits of the living had been issued by the bishop, but it was revoked and taken off on March 24, 1865, on the occasion of the defendant being appointed to the living.

J. Brown (*Crompton* with him) for the plaintiff.

Holker (*Edwards* with him) for the defendant.

Cur. adv. vult.

BOVILL, C.J., now delivered the judgment of the COURT in favour of the defendant, on the ground that, assuming the appointment of the defendant to be void, still the sentence of suspension was in force, and that that sentence operated *per se* to incapacitate the plaintiff from bringing any action to recover the profits of the benefice, notwithstanding the sequestration had been revoked. The COURT, in their judgment, disposed of several objections to the form of sentence, but all of which could not be explained in a short note, or made intelligible without setting out the sentence at length. It is sufficient to state that the COURT held that the offence with which the plaintiff was charged, being substantially that of incontinence with the female named in the charge, it was immaterial whether she was married or not, and therefore that it was no objection that the offence was stated to be 'adultery *or* fornication.' The COURT also held that it was not necessary to show on the face of the sentence that the seven days' notice of the execution of the commission was given as directed by section 4 of the Act (3 & 4 Vict. c. 86), or that the inquiry was in public, or that the provisions of the statute as to the preliminary proceedings, with which the bishop was not concerned, had been strictly observed; and further, that it was no valid objection to the sentence that it was not pronounced in the presence of the plaintiff, nor served upon him.

Judgment for the defendant.

Common Pleas. June 26, July 5. } FARROW *v.* WILSON AND WIFE.

Master and Servant—Farm Bailiff—Contract of Service Put an End to by Death of Party.

Declaration in an action against the female defendant as administratrix of one Price Pugh, deceased, for breach of contract of service entered into by the plaintiff with the said Pugh, by which the plaintiff was to serve Pugh as a farm bailiff at 15*s.* a week, with the benefit of a residence in a farm house, until six months' notice of putting an end to the service. The breach assigned was that although the plaintiff, after the death of Pugh, was willing to continue in the service of the administratrix on the same terms, the defendants dismissed him without six months' notice or six months' wages. The defendants demurred, and the demurrer was argued by

Bridge for the defendants; and by

Bush Cooper for the plaintiff.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the Court in favour of the defendants, on the ground that the death of either party put an end to the contract.

Judgment for defendants.

Common Pleas. July 5. } PILLAR *v.* THE LLYNVI COAL AND IRON COMPANY.

Truck Act—Artificer—Deductions.

The plaintiff, a tinman, was employed by the defendants, coal and iron masters, to make tin goods by the piece or by day, as might be required. He worked partly at home, sometimes worked for others, was paid just like any other workman, was paid by cheque which it was understood must be cashed at a shop of the defendants, where he would and did receive only part in cash, the rest in goods; deductions were made for tin supplied for his work, as had been agreed, also for coal, and also for sick-fund and schooling. He brought his action to recover under the Truck Act whatever had not been paid in cash.

Cole and *Bailey* for the plaintiff.

Mellish, *Prideaux*, and *Pindar* for the defendants.

The COURT now delivered judgment, and held—first, that looking to all the facts (which were very voluminous) they thought the plaintiff was bound to give his personal service, and was therefore, according to *Ingram* v. *Barnes*, an artificer; second, that even supposing it was necessary the servant should be employed in the master's trade, looking to the facts this was the case; third, that the payment by cheque was a device, and the plaintiff entitled to recover for what was given in the form of goods, but not for the price of the tin and coals; and fourth, as there was no writing, might recover as respects the sick-fund and schooling.

Common Pleas. July 5. } DUNCHY *v.* THE MAYOR OF LONDON.

Metropolis—Holborn Valley Improvement Act, 1864—*Lands Clauses Consolidation Act—Right to Compensation.*

This was an action brought to determine whether under the Holborn Valley Improvement Act, 1864, and the Acts incorporated therewith, the defendants were liable to pay compensation to the plaintiff as occupier of premises, the access to which had been affected by the Holborn Viaduct works.

W. G. Harrison (*Wright* with him) for the plaintiff.

Mellish (*Thesiger* with him) for the defendants.

The COURT now delivered judgment, and held, in accordance with *Ferrar* v. *The Commissioners of Sewers of London*, in the Exchequer Chamber, that section 68 of the Lands Clauses Consolidation Act was not incorporated, that the sections incorporated did not apply, that there was no right of action, and that, therefore, judgment should be for the defendants.

Exchequer. June 23. } THOMAS *v.* HAYWARD.

Lessor and Lessee—Covenant Running with Land.

Declaration by the assignee of the lessees of premises occupied as a public-house against the original lessor, for breach of a covenant not to build a house for the sale of beer and spirits within half a mile of the demised premises.

Demurrer and joinder.

Joseph Brown, for the defendant, contended that the plaintiff could not sue on this covenant.

Ryalls, contra, for the plaintiff.

The COURT (BRAMWELL, B., CHANNELL, B., and CLEASBY, B.) held that the covenant did not run with the land, and gave

Judgment for the defendant.

Exchequer. June 22. } WHEELER AND OTHERS *v.* THE METROPOLITAN BOARD OF WORKS.

Poor Rate—Lands Clauses Act 1845, *s.* 133.

The question for the Court in this case was whether the defendants were bound to make good the deficiency

in the poor rate in the parish of which the plaintiffs were churchwardens.

By section 33 of the Lands Clauses Act the promoters of any undertaking who became possessed by statute of lands liable to the poor rate, are, till their works are completed, 'to make good the deficiency' in the poor rate consequent on their taking the land.

The case stated that the works, of which the defendants were the promoters, were not yet completed, and that it was uncertain how much of the land taken in the parish for the works would be so used as to be capable of beneficial occupation.

Prentice (*Mortimer* with him) for the plaintiffs.

Raymond for the defendants.

The COURT (BRAMWELL, B., CHANNELL, B., and CLEASBY, B.) (following *The Mayor of London* v. *St. Andrew's, Holborn*, 36 Law J. Rep. (N.S.) M.C. 95) held that the case was within section 133 of the Lands Clauses Act, and gave judgment for the plaintiffs.

Judgment for the plaintiffs.

Exchequer. June 22. } GUARDIANS OF THE EAST LONDON UNION v. METROPOLITAN RAILWAY COMPANY.

Vendor and Purchaser—Award under Lands Clauses Act.

This was an action on an award under the Lands Clauses Act 1845, to which the defendants pleaded that the plaintiff had not executed any conveyance of the premises to the defendants.

Demurrer to the plea, and joinder.

Joseph Brown (with him *J. O. Griffits*), for the plaintiffs, contended that the execution of the conveyance was not a condition precedent to their right to sue for the price fixed by the arbitrators.

Horace Lloyd (with him *W. G. Harrison*) contra, for the defendants.

The COURT (BRAMWELL, B., CHANNELL, B., and CLEASBY, B.) held that the plaintiffs could not sue for the price fixed by the award until they executed a conveyance of the premises to the defendants.

Judgment for the defendants.

Probate and Matrimonial Causes.

Probate. May 25. June 22. } TICHBORNE v. TICHBORNE. *In the goods of* LADY TICHBORNE.

Concurrent Suits in Court of Chancery and Court of Probate—Receiver of Personal Estate appointed by Court of Chancery—Appointment of Administrator pendente lite on Application of Creditor—Practice.

This was an application by a creditor for the appointment of an administrator *pendente lite* of the personal estate and effects of the late Lady Tichborne; and the question was whether the Court would appoint an administrator where the Court of Chancery had already appointed a receiver of the personal estate of the deceased.

Besides the administration suit pending in the Court, raising the question as to the rights of the plaintiff and defendant to a grant of administration of the estate and effects of Lady Tichborne, there was also a suit in Chancery pending between the same parties, and in such suit the Court of Chancery had already appointed a receiver. The Court was moved on May 25 on behalf of a creditor to appoint the receiver also administrator *pendente lite*, in order that, there being a sufficient estate, the debts of the deceased might be paid. The motion was rejected, on the ground that the appointment might lead to a conflict of jurisdiction with the Court of Chancery; but LORD PENZANCE intimated that if the Court of Chancery entertained an application for payment to the creditors out of the moneys in the hands of the receiver, and that from any technical reason the appointment of an administrator was necessary for the purpose, he might then make the appointment. On June 12 the Court of Chancery was moved to order that an account of the intestate's debts might be taken, and that a sufficient part of the estate might be appropriated in payment of them; and STUART, V.C., thereupon suggested that an application for the appointment of an administrator *pendente lite* should again be made to the Court of Probate.

June 22.—*Dr. Deane* (with him *Ramadge*) renewed the application.

Dr. Tristram, for the plaintiff, consented to the appointment of an administrator, but objected to the receiver of the Court of Chancery being appointed.

Bayford (the *Solicitor-General* with him), for the defendant, opposed the application.

Lord PENZANCE said that it would be a monstrous hardship if the creditors of the deceased were compelled to wait for payment of their debts until the relatives of the deceased, who were contending for the administration of her estate, had brought their litigation to a close. By the practice of the Prerogative Court, an administrator was never appointed except at the instance of a party to the suit. A more extensive power was enjoyed by the Court of Probate, and as he was satisfied, from the observations of the VICE-CHANCELLOR, that no conflict of jurisdiction would arise, he should appoint the receiver also administrator *pendente lite*.

Probate. June 22. } *In the goods of* A. HICKS.

Will—Memorandum of Revocation—Probate—Practice.

On the death of the testator a will, dated August 4, 1864, was found. It had been duly executed, but several bequests and the signature of the testator had been struck through with a pen, and beneath the signature was written this memorandum: 'This, my last will and testament, is hereby cancelled, and as yet I have made no other. A. Hicks, August 14, 1868. Witnesses,

Ann Carter, cook; Mary Coles, housemaid.' There was evidence that the memorandum was duly executed by the deceased in the presence of the witnesses.

Dr. Tristram moved that administration, with the memorandum annexed, might be granted to the widow of the deceased. The memorandum revoked the will, and was therefore testamentary and entitled to probate, *Brenchley* v. *Still*, 2 Robert. 162.

Lord Penzance at first doubted whether the memorandum was entitled to probate, but on consideration allowed the grant of administration to go with the memorandum annexed as prayed.

High Court of Admiralty.

Admiralty Court. June 15. } The City of Buenos Ayres.

Damages—Limited Liability—Costs.

This was a cause of limitation of liability. The vessel, the City of Buenos Ayres, had been arrested in a cause of damage in respect of a collision with the ship Bismarck, and the owners of the former now prayed the Court to release the vessel upon their paying into Court the sum of 10,514*l.*, the statutory value of the ship, or upon giving bail for this amount.

E. C. Clarkson appeared for the City of Buenos Ayres.

Phillimore for the Bismarck.

Cohen for the owner of her cargo.

E. C. Clarkson having established the right of the owners of the City of Buenos Ayres to a limited liability, applied for costs against the owner of the Bismarck, who, he contended, had unnecessarily put his parties upon proof of their case.

The Court said that the *onus probandi* was upon the plaintiffs in this suit, and an affidavit setting forth the facts would have been sufficient for that purpose. In all such cases for the future it would be sufficient for a plaintiff to file an affidavit in proof of his case, and any parties objecting to such affidavit and putting plaintiffs to other modes of proof would have to pay the costs.

Admiralty Court. [June 15. } The Mary (otherwise Alexandra).

Possession—Sale of Vessel.

This is a cause of possession, in which the plaintiffs are the Government of the United States of America, and the defendant is Mr. Charles Kuhn Prioleau, of Liverpool. The plaintiffs in their petition state that the Mary (otherwise the Alexandra) was purchased by certain agents of the late Confederate Government with moneys which were the property of the plaintiffs, and that therefore they are entitled to possession of her. The cause was instituted in the sum of 20,000*l.* in the month of February 1867, and the vessel has ever since been lying under arrest.

Benjamin, on behalf of the defendant, now moved the Court to decree that the vessel should be sold, without prejudice to the question of damages. He believed there was no precedent for the sale of a vessel in a cause of possession, but the vessel in question, if not immediately sold, would be of no value to any one.

E. C. Clarkson, on behalf of the United States' Government, neither assented nor dissented from the application.

Sir R. J. Phillimore.—I have stated on various occasions during the progress of this cause that though I was conscious of the political questions involved in this suit, my course must be the same as though the plaintiffs and defendant were ordinary parties to a cause. There is no direct precedent for a sale in a cause of possession; but I know of no reason founded upon principle why there should not, under the circumstances, be a sale. The *res* is in the possession of the Court, and I have evidence before me that it has seriously deteriorated in value; it is therefore not only in the interest of the parties, but in accordance with the statutes and rules of the Court, that the vessel should be sold.

Decree accordingly.

Admiralty Court. June 15. } The Sobano.

Wages—Interest.

This was a cause of bottomry.

E. C. Clarkson applied to the Court to permit the bondholder to pay the wages of the crew, and add the sum so paid, with 5 per cent. interest, to the amount of the bond.

The Court.—You may pay the wages and add that amount to the bond, but there is no practice as to interest.

E. C. Clarkson.—The crew are foreigners, and the interest is merely a substitute for wages and maintenance money, which will run on if the crew are not now paid and sent home.

The Court.—Let the matter be referred to the registrar, to allow such interest as may be proper.

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PROBATE AND MATRIMONIAL.

WRIGHT *v.* ROGERS AND GOODISON—*Will: Execution: Signature of Witnesses in Presence of Deceased: Adverse Evidence of Surviving Attesting Witness: Probate* 203

Cases in the House of Lords.

House of Lords. July 13. } GREAT WESTERN RAILWAY CO. *v.* SUTTON.

Carriers by Railway—Packed Parcels—Different Persons Charged with Different Rates for Carriage—7 & 8 Vict. c. 3, s. 50—10 & 11 Vict. c. 226, s. 53.

Sutton, the plaintiff below, a carrier, was in the habit of collecting small parcels, putting them together in one large package, and sending them by the Great Western Railway to his agents in the large towns for distribution, and at the booking office of the company he declared them to be 'packed parcels.' The company charged different rates of carriage for different classes of goods, the highest charge being for packed parcels, and Mr. Sutton was charged the packed parcel rate of charge.

Mr. Sutton, finding that some other carriers who sent packed parcels were charged for them at a less rate, sued the company in an action for money had to his use, to recover the alleged excess so paid by him, founding his claim on section 50 of 7 & 8 Vict. c. 3, which provides that the company should make their charges equally on all persons, and that no reduction or advance should be made partially in favour of or against any particular person. At the trial, the plaintiff brought evidence that when he took his parcels to the company's office he was obliged to declare whether they were packed parcels or not, and that other great firms of carriers, who notoriously did the same business as he did, constantly took their packed parcels to the company's office and were not obliged to make such a declaration and were not charged the high rate he was.

The action was tried before Baron Martin and a special jury in July, 1864, when, under the direction of the learned judge, a verdict was found for the plaintiff, now defendant in error.

The company took exception to admission of the evidence, and further contended that under 10 & 11 Vict. c. 226, s. 53, they had power to make what charge they pleased for parcels under 500 lbs. weight; and, on error

brought, the Court of Exchequer Chamber affirmed Baron MARTIN'S ruling, ERLE, C.J., dissenting.

Error was now brought to this House. The case was argued in the session of 1868, the judges attending.

Sir J. Karslake, Field, and *Raymond* appeared for the company, the plaintiffs in error; and

J. Brown and *Marshall Griffith* for the defendant in error.

Two questions were left for the opinion of the learned judges—(1) Whether judgment ought to have been given in the Exchequer Chamber for the defendant in error? (2) Ought a *venire de novo* to have been awarded?

A majority of the judges delivered their opinions in favour of the defendant in error.

This HOUSE (present Lords CHELMSFORD, COLONSAY, and CAIRNS) now affirmed unanimously that judgment.

House of Lords. July 13. } THE HAMMERSMITH AND CITY RAILWAY CO. *v.* BRAND.

Lands Clauses Consolidation Act, 1845, *s.* 68—*Railways Clauses Consolidation Act*, 1845, *ss.* 6, 16—*Damage to Premises Adjoining Railway by Vibration.*

A house and premises adjoining a railway, but untouched by it, and belonging to an owner no portion of whose land was taken by the company, was depreciated in value through vibration, noise, and smoke, caused by the passage of locomotives over the railroad after it had been completed. On the trial in 1865 the jury awarded 272*l.* for damage to the plaintiff's house by vibration. The company refused to pay that sum, and on an action brought in the Court of Queen's Bench to recover it a special case was framed for the judgment of that Court, when judgment was given for the defendants the company, but on error brought to the Court of Exchequer Chamber, that Court reversed the judgment of the Court of Queen's Bench, Baron CHANNELL dissenting. The case was brought on error to this House. The judges attended. The case was argued at the bar of the House in the session of 1868. The learned judges delivered their opinions in April last, when their LORDSHIPS differed, WILLES, J., KEATING, J., LUSH, J., and PIGOTT, B., being of opinion that the defendant in error, the plaintiff below, was entitled to compensation for the damage sustained; BRAMWELL, B., and BLACKBURN, J., being of the contrary opinion.

This House now, by Lord CHELMSFORD and Lord COLONSAY (Lord CAIRNS dissenting), reversed the judgment of the Court of Exchequer Chamber, mainly on the ground that the running of the trains which occasioned the damage was an authorised and legalised use of the railway, and that the Legislature had not provided any compensation for such damage. Lord CAIRNS held that the premises were injuriously affected within section 68 of the Lands Clauses Act, and section 16 of the Railways Clauses Act.

Sir J. Karslake and *Mr. Russell* (with them *Mr. J. Digby*) appeared for the company.

Sir R. Palmer and *Mr. J. Dixon* for the defendants in error.

Privy Council Cases.

Privy Council. July 6. } RYLAND (APPELLANT) *v.* DELISLE (RESPONDENT).

Canada—Old French Law—Compensation—Code of Lower Canada, Article 1,188.

Present: Sir W. ERLE, Sir J. COLVILE, Lord Justice GIFFARD, and Sir J. NAPIER.

This was an appeal from a judgment of the Court of Queen's Bench of Lower Canada, reversing a judgment of the Superior Court of the district of Montreal.

The action was brought by the appellant in the Superior Court of Montreal, against the respondent, as a shareholder in the Montreal and Bytown Railway Company, for the sum of 638*l.* 4*s.* 7*d.*

The Consolidated Statutes of Canada, c. 66 s. 80, provide that 'each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities thereof, and until the whole amount of his stock shall have been paid up.'

The declaration in the action alleged that the respondent was personally liable to the appellant as a creditor of the said company, for a debt due by the company to the appellant, to an amount equal to the amount unpaid on the stock so held by the respondent, to wit, 900*l.*

The respondent, in bar to the said action, put in a plea of compensation, alleging in substance that a sum credited to him in the books of the company for salary as president of the company operated in law as an extinguishment by compensation of any amount which he might have owed the company, upon any shares of stock subscribed for by him and unpaid.

A *defense au fond en fait* was also filed.

At the trial it appeared that the appellant was the assignee of a judgment recovered by a creditor of the Montreal and Bytown Railway Company. That the respondent being a shareholder in the said company in November 1853, was appointed president of the said railway, and that a sum of 1,000*l.* was voted for his services for the year ending March 1854, and that credit for the sum of 1,000*l.* was given to the respondent in the books of the company.

The Superior Court of Montreal on March 31, 1866, gave judgment in the said action in favour of the appellant.

The respondent appealed from the said judgment to

the Court of Queen's Bench of Lower Canada; and on March 5, 1868, the Court of Queen's Bench reversed the judgment of the Superior Court of Montreal.

The question in the case on which the judgment turned was as to whether the amount due by the said respondent for balance unpaid on the stock subscribed for by him was compensated by the amount due by the company to him for the salary as president.

Article 1,188 of the Code of Lower Canada is as follows:—

'Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality. So soon as the debts exist simultaneously they are mutually extinguished, in so far as their respective amounts correspond.'

The Court of Queen's Bench of Lower Canada being of opinion that the money was voted and credited to the respondent for salary as president of the company, and that the company was solvent at the time such sum was so credited, was of opinion that compensation had taken place by operation of law, and reversed the judgment of the Superior Court.

Mr. J. Brown and *Mr. Thesiger* for the appellant.

Mr. Mellish and *Mr. Kerr* for the respondent.

Lord-Justice GIFFARD.—Their LORDSHIPS are of opinion that the judgment of the Court of Queen's Bench of Lower Canada must be reversed, and the judgment of the Superior Court of Montreal be affirmed with costs.

Privy Council. July 8. } WILSON AND ANOTHER (APPELLANTS) *v.* TRAILL (RESPONDENT).

Victoria—Foreign Attachment—Common Law Procedure Act (Victoria), 28 Vict. No. 274, s. 215,

Present: Lord-Justice GIFFARD, Sir J. COLVILE, and Sir J. NAPIER.

This was an appeal from an order of the Supreme Court of the colony of Victoria.

The appeal arose out of a writ of foreign attachment, issued under section 212 of the Common Law Procedure Act of the colony, against the respondent as garnishee, in a suit between the appellants as plaintiffs and one Launcelot Edward Threlkeld as defendant.

The facts were as follows:—

In the month of May 1866 the appellants entered into a contract with Launcelot Edward Threlkeld for the purchase of certain teas.

The appellants paid a deposit, according to the contract, in cash to the said Launcelot Edward Threlkeld, who also drew upon the appellants as stipulated by the contract, and such drafts were accepted by the appellants.

The teas were not delivered according to the terms of the contract, and in consequence the appellants commenced an action against the said Launcelot Edward Threlkeld, and caused a writ of summons to be issued against him on September 24, 1866.

The said Launcelot Edward Threlkeld was out of the jurisdiction of the Supreme Court at the date when such writ of summons was issued, and the said writ was returned *non est inventus*.

The cause of action having arisen within the colony of Victoria, the appellants were desirous of attaching the property of the said Launcelot Edward Threlkeld within the jurisdiction of the Supreme Court, under the provisions of the Common Law Procedure Act of the colony, 28 Vict. No. 274, ss. 211, 216, and the appellant William Wilson filed the necessary affidavit for that purpose, and on the same day a writ of foreign attachment was issued out of the Supreme Court directed to the respondent.

The respondent was at the time acting manager of the Oriental Bank Corporation at Melbourne, and as such manager held possession of certain bonded certificates for 318 and 49 chests of tea sent to the said bank by the said Launcelot Edward Threlkeld.

Upon the examination of the respondent with respect to the writ of foreign attachment, the respondent, on October 23, 1866, deposed that he held the teas for the said Launcelot Edward Threlkeld, that the value of the teas was about 2,000*l.*, but that the bank had a claim against the teas for about 1,600*l.*

The examination of the respondent was adjourned until November 20, 1866, when it was ordered that 218 of the 318 chests of tea should be attached to answer the appellant's claim, and that the attachment should be dissolved as to the remaining 100 chests and 49 chests.

On December 5, 1866, a rule *nisi* was obtained on behalf of the said Launcelot Edward Threlkeld, calling upon the appellants to show cause why the writ of foreign attachment should not be set aside; and on December 22, 1866, the Supreme Court ordered that the order of November 20 should be set aside.

On January 3, 1867, all the teas were removed, with the privity of the respondent.

On February 12, 1867, the appellants took out a summons calling upon the respondent, under section 215 of the Common Law Procedure Act of Victoria, to show cause why he should not pay damages to the appellants, on the ground that he had disposed of, or parted with and sent out of the jurisdiction, the goods attached in his hands.

Section 215 provides that if any garnishee shall dispose of any property except to the plaintiffs, he shall be liable in a summary way to pay damages to the plaintiffs.

The respondent filed an affidavit sworn by the said Launcelot Edward Threlkeld, in which he admitted that he entered into the contract of May 1866, and that the attached teas were part of the teas with which he had intended to fulfil such contract, but he also stated that the teas were not his property, but were the property of one Anton Tange, for whom he acted as agent. Tange also stated in an affidavit made by him that the teas were intended to be sold to the appellants on his account.

On September 5, 1867, an order was made dismissing the summons with costs, which order the Supreme Court afterwards made absolute, alleging as their reason for dismissing the summons that the Court had no jurisdiction to order, in a summary way, a person who disposes of what may be his own property, to pay damages to another person, who may have been injured thereby. From this order the appeal was brought.

Mr. Forsyth and *Mr. Pontifex* for the appellants.

Sir R. Palmer and *Mr. Macnamara* for the respondent.

Sir J. COLVILE.—Their LORDSHIPS are of opinion that the judgment of the Supreme Court of Victoria was right, and ought to be affirmed, and the appeal dismissed with costs.

Courts of Equity.

GIFFARD, L.J. July 9. } *In re* UNION CEMENT AND BRICK CO. *Ex parte* PULBROOK.

Solicitor and Client—Lien on Papers—Winding-up.

In this case the official liquidator had changed his solicitor during the progress of the winding-up. Afterwards he desired to have the production of certain documents in the hands of the former solicitor. These the latter refused to produce unless his bill of costs were paid, claiming a lien upon them.

STUART, V.C., having made an order upon the solicitor to produce the documents in question, the latter now appealed.

Mr. Greene and *Mr. Brooksbank* for the appellant.

Mr. Dickinson and *Mr. Everitt* for the official liquidator.

GIFFARD, L.J., decided that as under rule 58 the official liquidator could not give a lien upon the documents, in the winding-up the solicitor could not acquire one, and therefore the appeal must be dismissed, with costs.

GIFFARD, L.J. July 9. } JOINT-STOCK DISCOUNT CO. (LIMITED). FYFE'S CASE.

Company—Winding-up—Contributory.

The question in this appeal was whether Dr. Fyfe ought to be a contributory. His name was upon the register of shareholders at the date of the winding-up; but according to his contention the shares ought long previously to have been registered in the name of one Strawbridge, to whom he had transferred them. The only point arising for decision which calls for a report was whether the fact that Strawbridge was dead, and had no legal personal representative, was a bar to Dr. Fyfe's success, since no person could be put upon the list in his place.

Mr. Jackson for Dr. Fyfe.

Mr. Locock Webb for the official liquidator.

GIFFARD, L.J., thought that there was no difficulty arising from the fact that no one else could be substituted; and as the case in other respects was in his opinion clear, he directed Dr. Fyfe's name to be removed from the list of contributories.

LORD ROMILLY, M.R. July 8. } GOULY *v.* GOULY.

Production of Documents—Rights of Mortgagee.

Adjourned summons.

The plaintiff and the defendant were tenants in common, and the defendant had paid off certain mortgages on the property. The plaintiff's bill was for an account and partition, and the decree declared that the defendant was a mortgagee of the property, and that in the event of the plaintiff's paying what should be found due to the defendant by the chief clerk within six months after the certificate, he should be entitled to a commission of partition; otherwise his bill was to be dismissed.

The sum of 2,294*l.* was found due, and in order to pay it the plaintiff proposed to raise 2,500*l.* by a mortgage of his undivided share to persons who had agreed to advance the required sum on an inspection of the title-deeds. The object of the plaintiff's present application was to enable the proposed mortgagees to inspect the deeds.

Mr. J. Hinde Palmer and *Mr. Lea* appeared in support of the summons.

Mr. Chitty, for the defendant, urged that a mortgagee always had the right to refuse to produce his deeds, and that under the order of December, 1868, the plaintiff had no right to bring a stranger to see the deeds.

THE MASTER OF THE ROLLS said that this was a special case in which the ordinary rule as between mortgagor and mortgagee did not apply. The strict rule was, practically, never acted on. If it were, no one would ever be able to redeem a mortgage. The application must be granted.

LORD ROMILLY, M.R. July 10. } BAXTER *v.* RITCHIE.

Contempt—Ward of Court—Marriage without Leave of Court—Settlement.

Under a decree in the above-named suit, Louisa Ritchie, a ward of Court, became entitled to a sum of 1,249*l.* 2*s.* 8*d.* Consols. contingently upon her attaining the age of twenty-one years. Her father, Colin Ritchie, had also been appointed her guardian by an order of the Court.

In 1867 Louisa Ritchie, being about nineteen years of age, was married to Joseph Maria Hubert Müller, a Belgian citizen, without any settlement and without having asked leave of the Court, but with the full approbation and consent of her parents. The match was stated to be in every way suitable, and the husband was at the time in a good commercial business at Brussels, being also sole licensee for the sale of nitroglycerine in Belgium. A violent explosion of nitroglycerine resulted in such great loss to him, that he discontinued business in Brussels and commenced business as a merchant in London. For this purpose he required some capital, and both his wife, who is now twenty-one, and her parents considered it to the wife's interest that 600*l.* Consols., about half of the fund in Court, should be transferred to him.

The husband offered, if this were done, to settle on his wife and children a policy of insurance for 800*l.* on his own life, and to secure payment of the yearly premium by his covenant and by an assignment of his interest (estimated to be worth nearly 400*l.*) in certain property in Cologne.

A petition praying for a transfer of 600*l.* Consols to the husband, and for a settlement of the remainder, was now presented by the husband and wife and the wife's parents.

It was stated that the husband, being a foreigner, was ignorant that in marrying a ward without leave he

was committing contempt of Court, and Mr. Ritchie excused his own contempt on a similar ground, stating that he had formerly been articled to a lawyer in Scotland, where the practice was different; and that he supposed that, as the father, he could give consent without coming to the Court.

Mr. Jessel and *Mr. W. Barber*, for the petitioners, referred to *Martin* v. *Foster*, 7 De G. M. & G. 98.

The MASTER OF THE ROLLS made the order upon the terms offered, and intimated that, in settling the remaining half, he should allow the husband to take a life interest if he survived his wife.

STUART, V.C. { ALTON *v.* HARRISON. / POYSER *v.* HARRISON.

Mortgage to Secure Creditors—Possession of Debtor—Preference—Bona Fides—Sequestration.

On June 8, 1868, an order was made in these causes that T. L. Harrison should on or before November 2 pay into Court a sum of 1,327*l.* 7*s.* 3*d.*, due from him in respect of certain funds of which he was trustee.

The order was served on him on October 1, and a few days afterwards he called a meeting of five of his principal creditors, which was held on October 24; and on October 29 he executed a deed whereby he assigned to Spencer and J. N. Harrison, as trustees for those creditors, all his real and personal estate by way of mortgage for securing the payment of their debts as specified in the schedule to the amount of 1,230*l.* and interest. The deed contained a proviso for redemption on payment by T. L. Harrison of the debts within six months, and a covenant by his creditors not to sue till default, with a proviso that the trustees should permit him to remain in possession of his property for six months, but not so as to let in or permit any execution, extent, sequestration, or other process against the property, or against T. L. Harrison in respect thereof; and in case any such should be enforced, or attempted to be enforced, his possession should cease and determine. The deed empowered the trustees to sell the personalty in default of payment within six months, and sell the realty after six months notice; but they were not compellable to sell, except upon demand in writing of a majority in number and value of the creditors. The trusts of the sale moneys were, after payment of expenses, to pay the creditors named in the schedule, and to pay the surplus, if any, to T. L. Harrison.

This deed was registered as a bill of sale on November 17, 1868.

On December 18, default having been made in payment of the moneys by the order of June 8 directed to be paid, a writ of sequestration was issued, under which the sequestrator seized certain property of T. L. Harrison, but were met by the claim of the trustees under the mortgage deed, who moved for the withdrawal of the sequestration. The Court ordered an inquiry as to the interest of the trustees in the property, and the chief clerk having certified that they had none on the ground that the deed was executed for the purposes of defeating the sequestration, the trustees now moved to vary his certificate.

Mr. Dickinson and *Mr. Solomon* in support of the motion.

Mr. Mackeson and *Mr. W. W. Cooper* for the plaintiff in the first suit.

Mr. Greene and *Mr. Cates* for the plaintiff in the second suit.

STUART, V.C.—The question is whether the transaction is *bonâ fide* or a contrivance for the benefit of the debtor. The case is not within the operation of the bankruptcy laws, nor is it a good objection that a preference is given by the deed to the five creditors. A sale of property for good consideration is not void at common law, or by the statute 13 Eliz. c. 5, though made to defeat an expected execution (*Wood* v. *Dixie*, 7 Q.B. 892). The only doubtful circumstance is the continuance in possession of the debtor, but it being no objection to the deed that it is a mortgage, and redeemable for the benefit of other creditors, it is consistent that the mortgagor should continue in possession till default, and that his possession should only be defeasible more effectually to secure the creditors' preference. There being no ground for imputing *mala fides*, the certificate must be varied by finding that the trustees under the deed had an interest in the estate, against which the sequestrators cannot hold it.

STUART, V.C. } WATERLOW *v.* SHARP.
July 7, 8, 13. } GARDNER *v.* SHARP.

The London, Chatham, and Dover Railway Company—'The Rolling Stock Deed,' January 19, 1867—*Holders of Debentures Payable after the Date of the Deed—Clause* 6 *of the Deed, Construction of—Date of Order on Further Consideration.*

The further consideration of these causes was taken on the 7th and 8th instant, when the two following questions were argued:—

1. Whether those creditors of the London, Chatham, and Dover Railway Company who were debenture holders, but whose debentures were not payable till after January 19, 1867, were entitled to come in under the trusts of the deed executed by the company on that day for the benefit of its creditors?

2. Whether under clause 6 of that deed those secured creditors who were at liberty to come in under it were bound [as if in bankruptcy] to deduct the value of their securities from their claims, and to prove for the balance only; or whether they might [as in equity] prove for the full amount of their debts?

Sir Roundell Palmer, *Mr. Greene*, *Mr. Dickinson*, *Mr. Bristowe*, *Mr. Fry*, *Mr. Speed*, *Mr. Martineau*, *Mr. Waller*, *Mr. J. N. Higgins*, *Mr. Langworthy*, *Mr. Bagshawe*, *Mr. Hemming*, *Mr. Kekewich*, *Mr. Westlake*, *Mr. Stock*, and *Mr. Cookson* were for the several parties.

STUART, V.C., having reserved his judgment, now delivered it, and held:—1. That the holders of debentures, the money secured by which was not payable or recoverable till after the date of the deed, were not entitled to payment, under the trusts of the deed, of anything except interest due to them at that date. 2. That the true construction of clause 6 of the deed was that the practice of this Court, as to creditors holding securities, was to be followed; and, therefore, those debenture holders who were entitled to payment under the deed were not bound to deduct the value of their securities. The costs of all parties, except those of Mr. Fry's clients—viz., the General Credit Company—and those of a Mr. Gammon, prior to his coming in under the deed, were allowed out of the funds in Court. On the authority of *Boucicault* v. *Delafield* (33 Law J. Rep. (N.S.) Chanc. 38), the order now made was dated as of the 8th instant, on which day the arguments on the above-stated questions were concluded.

Courts of Common Law.

Queen's Bench. July 3. } SIMPSON *v.* YEEND.

'Bribery'—Municipal and Parliamentary Election—17 & 18 Vict. c. 102, s. 2—22 Vict. c. 35, s. 12.

By 22 Vict. c. 35, s. 11, any person guilty of bribery at a municipal election is made liable to a penalty, and by section 12 bribery is to include anything done before, at, or after, or with respect to any municipal election, which, if done before, at, or after, or with respect to any parliamentary election, would render the person doing the same liable to any pains, penalties, &c., on conviction for bribery under any Act for the time being in force with respect to parliamentary elections.

By 17 & 18 Vict. c. 102, s. 2, 'Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote or to refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election,' is declared to be guilty of bribery.

The question in the case was whether the defendant had been guilty of bribery at a municipal election, by offering a bribe to one of the voters before the election. It appeared that the defendant, at an interview with the voter's wife, had told her that her husband would be remunerated for what loss of time might occur to him, and afterwards told the voter that he would be remunerated for loss of time, but did not offer him any money.

Gray (*R. Collins* with him) for the plaintiff in the action for the penalty.

Manisty (*Bosanquet* with him) for the defendant.

The COURT (COCKBURN, C.J., MELLOR, J., LUSH, J., and HAYES, J.), after taking time to consult the election judges, now held that the defendant had been guilty of bribery within the meaning of the statute. The words 'remuneration for loss of time' would suggest to the voter that he would receive a valuable consideration by voting in a particular way, and it was the object of the statute to prevent any such inducement from being held out to him.

Judgment for the plaintiff.

Exchequer Chamber. (*Appeal from Exch.*) July 5. } CLIMIE *v.* WOOD.

Fixtures—Mortgagor and Mortgagee.

This was an appeal from a decision of the Court of Exchequer, by which it was held that certain articles affixed to land passed to the mortgagee of the land, though not expressly named in the mortgage, and though the jury at the trial had found that they were trade fixtures, and were removable without appreciable damage to the freehold.

Denman (with him *Simpson*) for the appellant.

H. Matthews (with him *Channell*) for the respondent.

The COURT (WILLES, J., BLACKBURN, J., KEATING, J., MELLOR, J., MONTAGUE SMITH, J., LUSH, J., HAYES, J., and BRETT, J.) affirmed the decision of the Court below, on the ground that the principle upon which trade fixtures are removable as between landlord and tenant did not apply to the case of mortgagor and mortgagee, and the general rule, *quicquid plantatur solo, solo cedit*, must therefore govern the case.

Exchequer. July 2. } DAVIS *v.* HAYCOCK.

Shares—Sale of—Contract to Indemnify against Calls—Liability of Ultimate Nominee—Privity of Contract—Rules of the Stock Exchange.

The declaration stated that it was agreed between the plaintiff and defendant that, in consideration that the plaintiff would sell to the defendant certain shares, and would execute and deliver to the defendant a transfer of the said shares, the defendant would buy and accept and pay for the same, and would execute the transfer of the said shares, and indemnify the plaintiff from all subsequent liabilities in respect of the said shares, or any calls which might thereafter be made in respect thereof. Breach, that the defendant did not execute the transfer, nor indemnify the plaintiff from calls.

Defendant pleaded *inter alia* a traverse of the agreement alleged in the declaration.

At the trial a verdict was entered for the plaintiff, subject to a special case. The facts as stated in the case appeared to be as follows:—The transactions out of which the action arose related to shares in Overend, Gurney & Co., and took place on the Stock Exchange, subject to its regulations and customs. The defendant was not the original purchaser of the plaintiff's shares, but the nominee, whose name was, in accordance with the custom of the Stock Exchange, tendered to the plaintiff, upon the settlement of the account, as that of the ultimate purchaser. The plaintiff made no objection to defendant's name, and executed a transfer of the shares to him, which, together with the share certificates, were delivered to the defendant. The defendant retained them, but did not execute the transfer. Calls were subsequently made, against which the plaintiff now claimed to be indemnified by the defendant.

H. James (with him *Mellish*), for the plaintiff, contended there was a privity of contract created by the custom of the Stock Exchange between the seller and ultimate nominee.

Sir G. Honyman, for the defendant, contended that though the acceptance of the 'name' might discharge the original purchaser, it did not follow that any privity of contract was created between the seller and the nominee; there was no contract between them at all,

still less such a contract as that alleged in the declaration. The price at which the seller agreed to sell was different from that at which the nominee agreed to purchase; the party to whom the seller agreed to sell was not the nominee, but the original purchaser. All the elements which at law were necessary to constitute a contract were wanting.

The Court, after taking time to consider, now delivered their judgment.

Kelly, C.B., and Pigott, B., were of opinion that the plaintiff was entitled to recover upon the pleadings as they stood, on the ground that upon the authorities it must be taken that, by the custom of the Stock Exchange, a contract was created between the seller and the nominee upon the acceptance by the former of the latter's name as that of the ultimate purchaser of the shares.

Channell, B., and Cleasby, B., were of the contrary opinion. They held that the contract alleged in the declaration was not proved by the facts. The sale was not between the seller and nominee, but the seller and the original purchaser. A concurrence of intention was necessary at law to constitute a contract. Here there was no such concurrence as to any term of the contract between the seller and nominee. They, therefore, were of opinion that the plaintiff could not sue at law as upon a contract between himself and the defendant, whatever his right might be in equity.

Probate and Matrimonial Causes.

Probate. June 15. } Wright *v.* Rogers and Goodison.

Will—Execution—Signature of Witnesses in Presence of Deceased—Adverse Evidence of Surviving Attesting Witness—Probate.

The testator, Mr. Thomas Pearce, late of Albion Grove West, Barnsbury, in the county of Middlesex, died on April 4, 1868, and on April 23, 1868, probate of his last will, dated April 2, 1868, was granted to the defendants, the executors named therein. Subsequently a citation, on the application of the plaintiff, was served upon them to bring in the probate, which they did, and propounded the will. The plaintiff thereupon pleaded that the will was not executed in accordance with the statute 1 Vict. c. 26. The will was signed by the testator, and had a complete attestation clause, with the names of two witnesses subscribed, namely Mr. Bell, the solicitor by whom it was prepared, and Mr. Haynes, his clerk. An affidavit as to certain alterations and as to due execution was made by Mr. Bell before the probate issued, and this affidavit, which was a printed form, was filled up in the handwriting of Mr. Haynes.

Mr. Bell died on March 17, 1869. A few days afterwards Mr. Haynes was requested by his then employer to put down in writing all the circumstances attending the execution of the will. He did so, but the statement contained no reference to any defect in the execution until his attention was particularly called to it, when he added that he and Mr. Bell did not sign the will in the presence of the testator, but in Mr. Bell's office on their return from Barnsbury. He said that he accompanied Mr. Bell to the residence of the testator, who was to execute a deed of revocation of a marriage settlement as well as the will; that when the testator signed the will he fell back insensible in the bed; that they had to wait for some time before he could sign the deed of revocation; that when he did sign it they at once left the house, Mr. Bell being anxious to get back to his office, and that on returning to the office they attested both the deed of revocation and the will. The witness adhered to this statement on his examination at the hearing of the cause on June 15. No other witness was produced to disprove or corroborate his statement, but it was shown to be inaccurate as to some unimportant matters which preceded the execution.

Kenealy (*Dr. Swabey* with him) for the plaintiff.

Dr. Spinks (*Dr. Tristram* with him) for the defendants.

Ballantine, Serjeant (*Inderwick* with him) for an intervener.

Lord Penzance.—So far as presumption i s concerned *prima facie* there could not be a stronger case upon which the Court would properly presume that the will was duly executed. The presumption is, of course, capable of being rebutted; but where two persons, one of them a professional man of large experience, have signed an attestation clause duly worded, the Court ought to have the strongest evidence to induce it to believe that the statement in the clause is not true. In this case the Court has the evidence of only one witness to the fact that they did not sign in the presence of the deceased; but when I find that he stood by and assented to an affidavit made by his fellow witness to the effect that the will was duly executed, and also remained so long without disclosing the alleged defect in the attestation, I cannot rely upon his recollection of what took place. Under all the circumstances, I am not satisfied with the evidence, and I shall therefore hold that the will was well executed.

Notes of Recent Decisions.

ADMIRALTY.

COLLISION.—Two steam vessels, the L. J. R. and the Q., came into collision, and those on board the Q. rendered no assistance to the L. J. R., which greatly needed it. The Q. was in charge of a pilot, compulsorily taken. Semble, that the omission to render assistance after the collision was the fault of the master, as the 'person in charge' for this purpose; but that the owners of the Q. would nevertheless not be liable for the collision itself if it had been caused solely by the pilot.—*The Queen*, 38 Law J. Rep. Adm. 39.

COSTS.—In a case of damage the only defence was, that the collision was caused by the fault of a pilot whom defendants were compelled to take. Defendants having proved their case—held that plaintiff must be condemned in costs.—*The Royal Charter*, 38 Law J. Rep. Adm. 36.

DAMAGE.—A vessel with an anchor down, but not held by or under the control of it, is under way so as to render it obligatory to exhibit her coloured lights.—*The Esk; The Gitana*, 38 Law J. Rep. Adm. 33.

MORTGAGE.—Mortgagee of four sixty-fourth shares of a vessel condemned in the costs, but not damages, occasioned by a wrongful arrest of the vessel.—*The Egerateia*, 38 Law J. Rep. Adm. 40.

PRACTICE.—In a cause of damage defendants, by their pleadings, made no charge against the plaintiffs, but only denied generally the averments in the petition, and pleaded inevitable accident. Held, that defendants ought to begin.—*The Thomas Lea*, 38 Law J. Rep. Adm. 37.

SALVAGE.—A vessel which had been saved was valued by a receiver of wreck at less than 1,000*l*. The salvors obtained an order for a commission of appraisement, but did not execute it, and after three weeks gave notice that they proceeded no further in the suit. Held, that they might, within four days of obtaining the order, have ascertained the value, and that therefore they must be condemned in damages for detention of the vessel during the rest of the three weeks.—*The Margaret and Jane*, 38 Law J. Rep. Adm. 38.

PROBATE AND MATRIMONIAL.

COSTS.—A suit for a decree of nullity promoted by the wife on the ground of impotency was dismissed. Subsequently she filed a petition for dissolution of marriage on the ground of adultery, coupled with cruelty and desertion, and obtained a decree *nisi*. The Court held that the respondent ought not to be condemned in the costs of both suits; and in allowing the petitioner the full costs of the suit in which she was successful, ordered that the respondent should have credit for the sum paid by him on account of her costs in the suit for nullity.—*Ditchfield* v. *Ditchfield*, 38 Law J. Rep. P. & M. 51.

DISSOLUTION OF MARRIAGE.—The husband obtained a decree *nisi* for dissolution of the marriage, and a fortnight afterwards re-married. The Court being satisfied that in contracting the second marriage he honestly believed that the first had been dissolved by the decree *nisi*, and that he had no intention of committing adultery, exercised the discretion vested in it under section 31 of the Divorce Act, and made the decree absolute.—*Noble* v. *Noble*, 38 Law J. Rep. P. & M. 52.

JUDICIAL SEPARATION.—Husband and wife agreed to live separate and apart. The agreement was silent as to the future life of the husband, but it was alleged that when it was entered into the wife was aware that he was living with another woman, and that the understanding was that the intimacy was to be continued. The Court investigated the circumstances under which the agreement was made, and being satisfied that the wife had not connived at the husband's adultery, decreed judicial separation on her petition.—*Ross* v. *Ross*, 38 Law J. Rep. P. & M. 49.

To constitute connivance on the part of the wife it is not necessary that there should be a willing consent to the adultery of the husband. She may be unwilling to consent to his living with another woman; but if under pressure of circumstances, short of force in the nature of duress, she should withdraw her scruples that would amount to connivance.

WILL.—A. made his will on a printed form. After he had written his name in the attestation clause, he asked the witnesses to subscribe and attest the will, which they did in his presence. He then wrote his name underneath their signatures, and remarked that they were witnesses to his will. The Court being satisfied on the evidence that he intended, by signing his name in the attestation clause, to execute the will, ordered probate to issue without the signature of the deceased written under the names of the witnesses,—*In the goods of Casmore*, 38 Law J. Rep. P. & M. 54.

WILL.—The Court of Probate has no power to appoint a receiver unless the validity of the will by which the real estate is affected is in dispute. It therefore refused to appoint a receiver when the only question was as to the person who was appointed executor in the will.—*Grant* v. *Grant*, 38 Law J. Rep. P. & M. 55.

ECCLESIASTICAL.

FACULTY.—The rector of a parish church applied for a faculty to make certain alterations, at his own expense, in the furniture and fittings of the church, which were not in a dilapidated state. The churchwardens, acting on behalf of the parishioners, opposed the grant of the faculty. The applicant having failed to show either that the existing arrangements in the fittings of the church were so inconvenient and uncomfortable as to deter the parishioners from attending divine service, or that the proposed alterations were so clearly for the increased comfort and advantage of the parishioners as to induce the Court to overrule their opposition, the faculty was refused.—*Evans* v. *Slack*, 38 Law J. Rep. Eccles. 38.

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Privy Council. July 15. } DROEGE & Co. (APPELLANTS), STUART AND ANOTHER (RESPONDENTS).

Admiralty—Bottomry Bond—Freight—Cargo—Liability of.

This was an appeal from a judgment of the High Court of Admiralty of England pronounced in a cause of bottomry instituted by the respondents, the holders of a bottomry bond upon the vessel Karnak, her freight, and the cargo, against the Karnak, her said freight and cargo. Of this cargo the appellants were the owners.

The Karnak, a vessel of 267 tons register, was in the year 1866 at Galveston, in the United States of America, where, on November 21, she was chartered to the appellants, there to load a cargo of cotton, and to carry the same to Liverpool for freight, and the vessel was to be consigned to the order of the appellants, Messrs. Droege & Co., of Manchester.

In pursuance of the said charter-party, the Karnak took on board 720 bales of cotton, the cargo proceeded against, for which the master signed bills of lading, and on December 24, 1866, the vessel, with the cargo on board, sailed for Liverpool.

On January 17, 1867, the Karnak, having in the prosecution of her voyage met with bad weather and suffered considerable damage, put into the port of St. George, in the Island of Bermuda, in distress, and the master proceeded, shortly after his arrival, to have his vessel repaired.

In order to obtain a sum of 2,600*l.* 6*s.* 1*d.* for the payment of the repairs as well as of other charges and expenses incurred by him at the port of St. George, the master executed a bottomry bond, by which he hypothecated the vessel, her cargo and freight, to secure the repayment of 3,228*l.* 7*s.* 3*d.*, being the said sum o 2,690*l.* 6*s.* 1*d.* and marine interest, and the Karnak subsequently proceeded on and completed her voyage t

Liverpool. The bottomry bond, of which the respondents became the holders, was never paid.

The respondents instituted a suit against the Karnak, her cargo and freight, and the owners of the vessel having allowed judgment to go by default, the Karnak was sold by order of the Court of Admiralty. The proceeds of such sale were paid into Court, and the Court pronounced for the force and validity of the bottomry bond, so far as regarded the Karnak and her freight. The nett proceeds of the sale of the Karnak available for payment of the said bond amounted to 512*l.* 11*s.* 9*d.*

The whole of the freight originally payable under the aforesaid charter-party in respect of the cargo proceeded against in this cause, amounted to a sum of 1,324*l.* 16*s.* The appellants, however, did not pay the whole of that sum into Court, but only the sum of 628*l.* 15*s.* 3*d.*, contending that they had satisfied the residue by advances on account of freight made by the charterers at Galveston, together with costs of insurance and interest and commission.

The cause came on for hearing in the Court below, and the appellants contended that the bottomry bond was invalid as against the cargo; that they were entitled to insist on the part payment of freight.

The learned judge of the Court below pronounced for the validity of the bottomry bond, so far as it affected the cargo, and directed the appellants to pay into Court the sum which they had retained out of the freight.

From this judgment this appeal was brought.

Sir G. Honyman and *Mr. Cohen* for the appellants.

Sir J. Karslake and *Mr. Clarkson* for the respondents.

Sir W. ERLE.—Their LORDSHIPS are of opinion that the judgment of the Court below ought to be affirmed.

Privy Council. July 15. THE OWNERS OF THE LION (APPELLANTS) *v.* THE OWNERS OF THE YORKTOWN (RESPONDENTS). THE LION.

Present: Lord ROMILLY, Sir WILLIAM ERLE, Sir J. COLVILE, and Sir J. NAPIER.

Admiralty—Collision—Compulsory Pilotage—Passenger Ship—Merchant Shipping Act, 1854, *ss.* 351, 379.

This was an appeal from a decree of the Judge of the High Court of Admiralty of England, in a cause of damage promoted by the owners of the ship Yorktown, the respondents, against the steamship Lion, of which the appellants were owners, for the recovery of damages in respect of loss occasioned by a collision between the Lion and the Yorktown.

The collision occurred on December 8, 1867, in Blackwall Reach, of the river Thames.

The Lion was in ballast, and was proceeding from London to Hull. She was in charge of Richard West, a pilot for the district within which the collision occurred. It was admitted that the collision was wholly occasioned by the default of the said Richard West; and the question was whether the appellants were excused from liability for the consequences of the collision, on the ground that they were compelled by law to have a pilot on board.

This depended upon whether the Lion was or was not carrying passengers or a passenger, pilotage being compulsory in the former case, but not in the latter.

It appeared by the evidence that the master of the Lion had, before starting from London, taken on board, for conveyance to Hull, his wife and her father, and that they were on board at the time of the collision, but that they did not pay any fare.

The learned judge of the Court below, under these circumstances, held that the Lion was not carrying passengers so as to render pilotage compulsory on her, and made a decree condemning the appellants in the damages, with costs.

From this decision this appeal was brought.

Mr. Milward and *Mr. Clarkson* for the appellants.

Dr. Deane and *Mr. Butt* for the respondents.

Lord ROMILLY delivered the judgment of their LORDSHIPS:—Their LORDSHIPS are of opinion that the wife and father of the master were not passengers within the meaning of the Merchant Shipping Act, 1854, and that the owners of the Lion were liable for the damage arising from the collision.

Privy Council. July 17. REGINA *v.* MURPHY.

Present: Sir W. ERLE, Sir J. COLVILE, and Sir R. PHILLIMORE.

New South Wales—Felony—Venire de Novo.

This was an appeal from a judgment of the Supreme Court of New South Wales.

An information was filed in the Supreme Court at Sydney, by the Attorney-General of the colony, charging that the respondent did kill and murder one Samuel Hassen. To this information the respondent pleaded not guilty, and issue was joined thereon.

The respondent was on August 19, 20, and 21, 1867, tried upon the said information before one of the judges of the Supreme Court and a jury.

After hearing the evidence for the Crown and the prisoner, and having been addressed by the counsel for the Crown and the prisoner respectively, and being charged by the judge, the jury retired from the Court to consider their verdict. The jury returned into Court, and stated that they had not agreed, and were not likely to agree, and having been then kept, without separating, for the space of upwards of three days and three nights, they were discharged by the judge from giving any verdict.

The respondent was again tried at the next session of the Supreme Court, on Sept. 10, 11, 12, 13, and 14, 1867, before another of the judges of the said Court and another jury, and on Sept. 14 the jury found that the respondent was guilty, and the respondent was sentenced to death.

After the adjournment of the Court on Sept. 10, 11, 12, and 13, the jurors were lodged at a hotel in Sydney, under the charge of the sheriff's officer. During the times when they were at such hotel, and before giving their verdict, the said jurors were allowed the use of the newspapers of the day, containing reports of the trial so far as it had gone.

On September 19, 1867, a rule was granted by the Supreme Court, calling upon the appellant to show cause why a *venire de novo* should not issue for the trial of the respondent, on the ground that the jurors, after they had been empanelled to try the case, and before they delivered their verdict, were allowed the use of newspapers containing reports of the case.

On September 24, 1867, this rule was made absolute.

Her Majesty's Attorney-General for the colony presented a petition for special leave to appeal against this judgment.

Sir R. Palmer and *Mr. Cohen* for the appellant.

The *Solicitor-General* (*Sir J. D. Coleridge*) and *Mr. Archibald* for the respondent.

Sir W. ERLE delivered the judgment of their LORDSHIPS:—Their LORDSHIPS are of opinion that the writ of *venire de novo* was not applicable in this case. The appeal will therefore be allowed and the order of the Supreme Court reversed.

Courts of Equity.

GIFFARD, L.J. } *In re* RICHARDS, *Ex parte* ASTBURY, AND
July 2. } *Ex parte* LLOYD'S BANKING CO.

Bankruptcy—Mortgage—Order and Disposition—Fixtures—Rollers in Mills.

The question on this appeal from a decision of Mr. Registrar Tudor, acting as commissioner in the Birmingham Court of Bankruptcy, was whether certain rollers, weighing machines, and straightening plates, which were movable parts of an iron manufacturer's machinery, so far formed part of the machinery as to be subject to an equitable mortgage of the lease of the mill, or were, as mere movable chattels, in the order and disposition of the bankrupt at the date of his bankruptcy.

There appeared to be several duplicate rollers which had been fitted to the machinery and used with it. The straightening plates were, as their name imports, massive flat iron plates sunk into the floor, and the weighing machines were simply placed in holes fitted to receive them.

The COURT below having decided that all the duplicate rollers formed parts of the machine, and were subject to the mortgage, but neither the weighing machines nor straightening plates, both sides appealed.

Mr. Jessel, *Mr. Little*, and *Mr. G. Smith* for the assignee Astbury.

Mr. Fry and *Mr. Finlay Knight* for the mortgagees, Lloyd's Banking Company.

His LORDSHIP held that all rollers that had been fitted to the machine formed part of it. Also that the straightening plates formed part of the floor; these, therefore, must be considered as included in the mortgage of the building. The weighing machines, on the other hand, were only movable chattels and not fixtures, and so passed to the assignees.

GIFFARD, L.J. } BROWN *v.* ADAMS.
July 16. }

Trust and Trustee—Following Trust Moneys—Banking Account.

The question in this appeal was whether the plaintiff could claim specifically a balance of 2,847*l.* 17*s.* 5*d.* at the bankers' of one Hales at the date of his death. The plaintiff was a client of Hales (a solicitor), and had entrusted to him the sum of 5,000*l.* to invest, which sum was paid into Messrs. Drummond's bank the same day. There was then a balance of 4,063*l.* besides the 5,000*l.* During the period between this transaction and his death, Hales paid into his bank about 12,000*l.* and drew out about 18,000*l.*, leaving the balance now in question. No investment was ever made. V.C. JAMES had granted an injunction restraining the defendant, the administrator, from parting with the balance, and from this he now appealed.

Mr. Kay and *Mr. Roberts* for the appellant.

Mr. Willcock and *Mr. C. Browne* for the respondent, the plaintiff.

His LORDSHIP thought that the case was governed by *Pennell* v. *Deffell* (4 De G. M. & G. 372), and dissolved the injunction.

GIFFARD, L.J. } ALTON *v.* HARRISON.
July 16. } POYSER *v.* HARRISON.

Mortgage to Secure Creditors—Possession of Debtor—Preference.

This was an appeal from the order of V.C. STUART, noted *ante*, p. 201.

Mr. Mackeson and *Mr. W. W. Cooper* for the appellant.

Mr. Dickinson and *Mr. Solomon*, for the respondents, were not called upon.

His LORDSHIP dismissed the appeal, with costs.

LORD ROMILLY, M.R. } *In re* BARNED'S BANK. FORWOOD'S CASE.
July 13. }

Company—Winding-up—Secured Debt—Proof—Claim—Date of Claim.

This was a claim by Messrs. Forwood (formerly Messrs. Leach, Harrison & Forwood) to be allowed to prove against the estate of Barned's Bank, now in liquidation, for two sums of 9,000*l.* and 6,000*l.* The claim was founded on two letters of guarantee, dated respectively March 27 and April 4, 1866, by which the bank, in consideration that Messrs. Leach, Harrison & Co. would accept drafts of Messrs. Maclean & Co. against certain ships, agreed to provide funds to meet such drafts at least seven days before maturity.

Barned's Bank stopped payment on April 18, and was ordered to be wound up on April 27, 1866.

Messrs. Leach, Harrison & Co. accepted the bills referred to in the guarantees, and (in the case of each guarantee) the day before the bills referred to in it arrived at maturity the clerk of a Mr. Lowndes, a notary public employed by Messrs. Leach, Harrison & Co., presented the letter of guarantee to a clerk in the office of the liquidator of the bank, demanding payment. In September 1866 Messrs. Leach & Co. sold the ships against which the bills were drawn, thus realising a great part of their debt. They afterwards sent in a more formal claim, and now asked to be allowed to prove for the whole amount of the 15,000*l.*

The LORDS JUSTICES having decided in *Kellock's case*,

L. R. 3 Chanc. 769, that a secured creditor is entitled to prove for the amount due at the time when his claim is sent in, in accordance with rule 20 of the general order made in pursuance of the Companies' Act, 1862, without regard to securities which have been realised by him between the sending in of his claim and the adjudication thereon; the question in the present case was whether the application by the notary was a due sending in of a claim, in which case the applicants would be entitled to prove for the whole debt; or whether their claim was only made after the sale of the ships, in which case they would only be entitled to prove for the balance.

Mr. Jessel and *Mr. Hemming* for the applicants.

Sir R. Baggallay and *Mr. Kekewich* for the official liquidator, *contra.*

The Master of the Rolls held, that the presentation of the letters of guarantee was no claim, those instruments being only documents from which the existence of a possible claim might perhaps be reasonably inferred, but not amounting to claims in writing containing particulars of the demand and the name and address of the creditor as required by rule 20 of the general order. The applicants would therefore be admitted to prove for the balance of their debt only.

Lord Romilly, M.R. July 13, 14. } Wilkinson *v.* Lindgren.

On the hearing of this case on June 28 (reported *ante*, p. 183), the charities mentioned in the will of the testatrix were not represented. They subsequently obtained leave to appear and to have the case re-argued.

Mr. Southgate and *Mr. Bunting*, for the charities, now contended that the adjective 'religious' qualified the word 'purposes' as well as the word 'institution.' There was, therefore, a good charitable bequest.

Mr. Roxburgh and *Mr. Phear*, for the next of kin, *contra.*

The Master of the Rolls said that he thought the view he had taken on the previous hearing was wrong. It would be an arbitrary construction to hold that the word 'religious' applied to the word 'institution' only and not to the word 'purposes,' especially as this would produce an intestacy. There would be a declaration that there was a good charitable bequest of the residuary personalty.

Lord Romilly, M.R. July 14, 15. } *In re* The Blakeley Ordnance Co. Creyke's Case.

Companies Act, 1862, *s.* 38—*Forfeited Shares—Liability for Past Debts.*

This was an application by the official liquidator to put the name of Mr. Creyke on the list of contributories as a past member.

Mr. Creyke's shares had been forfeited for nonpayment of a call. The articles of association reserved the rights of the company against the holders of forfeited shares for unpaid calls. Mr. Creyke had subsequently paid the call for default in punctual payment of which his shares had been forfeited. The question was whether he still remained liable to contribute to debts of the company contracted before he ceased to be a member.

Sir R. Baggallay and *Mr. N. Higgins* for the official liquidator.

Mr. Jessel and *Mr. Speed*, for Mr. Creyke, argued that the rights of the company, after payment of the unpaid call, were extinguished by the forfeiture under the articles of association; that the creditors had given credit to the company, subject to the power of the directors to declare the shares forfeited and thus release their holder from subsequent claims.

The Master of the Rolls said that *Bridger and Mill's* case (4 Chanc. App. 266) had decided that the forfeiture of shares did not relieve the shareholder from liability to pay both the past calls and the past debts of the company; and this was clearly the effect of section 38 of the Companies Act, 1862. The name of Mr. Creyke must therefore be put on the list of past members.

Lord Romilly, M.R. July 15. } *In re* The Joint-stock Discount Company. The Warrant Finance Company's Case.

Winding-up—Proof against Two Estates—Interest.

The Warrant Finance Company were the holders of bills indorsed by the Joint-stock Discount Company, which was now in liquidation. As such they had proved against the Joint-stock Discount Company for the amount of the principal and interest due on the bills at the commencement of the winding-up, and they had received dividends to the extent of 15*s.* 6*d.* in the pound.

Mr. Jessel and *Mr. Locock Webb* now moved that they might be restrained from receiving further dividends until the other creditors had been paid their debts in full, on the ground that they had already received the remaining 4*s.* 6*d.* in the pound on the amount for which they had proved in dividends paid by the Contract Corporation, who were the acceptors of the bills; and they cited *The Humber Iron Works Company, Ex parte The Warrant Finance Company*, 17 W. R. 780, to show that the Warrant Finance Company was not entitled to interest after the date of the winding-up.

Sir R. Baggallay and *Mr. Langley* opposed the motion, on the ground that the rule established by the Humber Iron Works Company applied only to a case of proof against a single insolvent estate, and that they were entitled to continue receiving dividends *pari passu* with the other creditors until the whole of their claim, including interest up to the present time, had been satisfied by dividends from one estate or the other.

The Master of the Rolls held that the question was concluded by the decision in the case of the Humber Iron Works Company, and that the Warrant Finance Company was not entitled to receive any more dividends from the Joint-Stock Discount Company until the other creditors had been paid in full.

Lord Romilly, M.R. July 16. } Pearce *v.* Morris.

Mortgage—Payment of Money Secured—Right to Legal Estate and Title Deeds.

The defendant was the transferee of certain mortgages, and as such had acquired the legal estate in fee in the land and possession of the title deeds. He gave notice of his intention to exercise the power of sale, and the plaintiff, who claimed to be interested in the equity of redemption, thereupon tendered, and the defendant accepted the principal, interest, and costs secured by the mortgages. The interest of the plaintiff was under

a contract for the purchase of the equity of redemption in a part of the property; but he had raised difficulties as to the title, which had not been removed, and the defendant declined to convey to him the legal estate, and deliver up to him the title deeds, on the ground that he was bound to reconvey to the owner of the equity of redemption.

Mr. Southgate (*Mr. Villiers* with him) appeared for the plaintiff.

Mr. Jessel and *Mr. Nalder* for the defendant.

The MASTER OF THE ROLLS held that the mortgagee, by accepting the money, admitted that the person from whom he received it was entitled to redeem him, and he was bound to convey the legal estate and deliver up the deeds to the person so entitled.

STUART, V.C. July 10. } CHRISTIAN *v.* ADAMSON.

Executor—Admission of Assets—Account—Costs.

The bill in this suit was filed by *cestui que trusts* against the executors of a deceased trustee, to obtain a declaration that an investment of the trust funds upon a mortgage security, which turned out insufficient, was a breach of trust which the assets of the trustee were liable to make good, and for consequential relief. By the decree on the hearing, the VICE-CHANCELLOR made a declaration that the estate of the deceased trustee was liable for the loss, and ordered the defendants to sell the property comprised in the security, directing that in case the defendants should not admit assets sufficient with the sale money to meet the plaintiff's claim, an account should be taken of the real and personal estate of the deceased trustee. The executors did not admit assets, and the account when taken showed that at the date of the decree there were assets sufficient, with the produce of the property which was subsequently sold, to have paid the amount due at the time of the decree. The cause now came on upon further consideration, and the only question argued was whether, under these circumstances, the executors were personally liable to pay the costs of taking the account, occasioned by their refusal to admit assets.

Mr. Greene and *Mr. W. W. Knox* for the plaintiffs.

Mr. Dickenson and *Mr. J. W. Chitty* for the defendants.

The VICE-CHANCELLOR held that the executors having by their refusal occasioned the expense of the subsequent proceedings, they must personally pay the costs which their conduct had obliged the plaintiffs to incur.

STUART, V.C. July 14. } HAMMONDS *v.* BARRETT.

Husband and Wife—Post-Nuptial Settlement—Proviso for Cesser of Husband's Life Interest—Assignment—Bankruptcy—Forfeiture.

On March 19, 1844, Samuel Barrett married Isabel, his wife. By an indenture of settlement dated July 4, 1862, and made between Mr. Barrett of the first part, his wife of the second part, and the plaintiff in the suit and Mr. Barrett of the third part, after reciting to the effect that Marmaduke Clark, the brother of Mrs. Barrett, was desirous of settling 4,000*l.* on her and her children, and that it had been agreed that Mr. Barrett should also settle a sum of 990*l.* Madras stock, which he had acquired in right of his wife, upon her and his children, those trust funds were accordingly settled upon Mrs. Barrett for her life for her separate use, and after her decease upon Mr. Barrett for his life, 'or until or in case he should become bankrupt or take the benefit of any Act for the relief of insolvent debtors, or commit or do any act, deed, matter, or thing whatsoever whereby the interest, dividends, and annual profits of the said trust funds should become vested in any other person,' when Mr. Barrett's life estate was to cease as if he were dead. After his decease the trust funds were to be held for the benefit of the children of Mr. and Mrs. Barrett as in the indenture mentioned. Mrs. Barrett died in October 1862. In May 1866 Mr. Barrett gave his bond to Marmaduke Clark to secure 300*l.* with interest, and thereby also 'authorised and directed the plaintiff to receive and retain the interest, dividends, and annual income of the settlement funds,' as a further security for the 300*l.* and interest. On April 16, 1867, Mr. Barrett was duly declared a bankrupt, and Ebenezer Jull was appointed his assignee. Mr. Barrett died on May 2, 1868.

The bill in this suit was filed to establish the trusts of, and to ascertain the right of parties under the post-nuptial settlement.

Mr. Babington appeared for the plaintiff.

Mr. T. Hughes and *Mr. Tanner*, for the assignee in bankruptcy, claimed (*a*) the 990*l.* Madras stock, on the grounds that the settlement of it by Mr. Barrett was a voluntary one, and that as the settlement reserved to Mr. Barrett a life interest in the property, it was obnoxious to the rule laid down in *Higinbotham* v. *Holme*, 19 Ves. 88. (*b*) He also asked that the income in the whole of the trust funds between the bankruptcy and the death of Mr. Barrett should be paid to the assignee.

Mr. F. H. Colt, for one of the children of Mr. and Mrs. Barrett, said that the giving of the bond by Mr. Barrett was a forfeiture of his life interest under the settlement, and that from the date of the bond the children became entitled to the trust funds.

Mr. J. Moulton was for Mr. Marmaduke Clark.

Mr. Dickinson, *Mr. E. K. Karslake*, and *Mr. W. W. Karslake* were for other parties.

STUART, V.C., held that inasmuch as Mr. M. Clark, who settled the 4,000*l.* on his sister and her children, had a perfect right to make his own terms with Mr. Barrett on that occasion, he had virtually purchased the further right to settle the 990*l.* Madras stock on them, and therefore the assignee had no claim upon it. He was also of opinion that the form in which the bond was given to Mr. M. Clark by Mr. Barrett operated as a forfeiture of his life interest under the settlement, and made a declaration accordingly.

STUART, V.C. July 13, 14. } CROOK *v.* HILL.

Marriage with a Deceased Wife's Sister—Issue of, cannot take under a Bequest to 'Children'—Demurrer.

The bill in this suit stated that, some time prior to the year 1851, John Crook married Ann Hill, a daughter of the testator in the suit. She died in 1851, and in 1854 John Crook, with the full knowledge of the testator, went through the ceremony of marriage with Mary Hill, another of his daughters. That union was regarded by the testator as an existing marriage. Two children of Mary Crook were born prior to the year 1859. The testator recognised John Crook as his son-in-law, and always treated the two children as his grandchildren. On March 9, 1859, Mary Crook was, and for

about six months had been, *enceinte* with another child, and the testator was aware of that fact. By his will, dated on that same March 9, 1859, he bequeathed certain leaseholds 'upon trust during such part of his term, estate and interest therein, as his daughter Mary, the wife of the said John Crook, should happen to live,' for her separate use. The testator directed that, on the death of Mary Crook, the property should be held 'upon such trust for the benefit of all and every, or such one or more, exclusively of the other or others of the children or child of his said daughter Mary Crook,' in such manner as she should by will appoint; and in default, 'upon trust for the child, if only one, or all the children, if more than one, of his said daughter, Mary Crook.' The testator died on March 22, 1859. The child of which Mary Crook was *enceinte* at the date of the will was born on June 27 following, and named Robert. Mary Crook subsequently had a fourth child by John Crook. She died on March 2, 1868, having, by a will made in pursuance of the aforesaid power, appointed the leaseholds among her four children equally.

The two eldest children of Mary Crook, infants, by John Crook, their father and next friend, filed the bill in this suit against the executors of the testator and Robert Crook, praying a declaration that 'the plaintiffs and, if the Court should be of such opinion, the defendant Robert Crook were intended by the testator's will to take as children of his daughter Mary Crook,' and for a decree for the administration of his estate accordingly.

The defendants, the executors, by arrangement in order to raise the point of construction, demurred to the bill for want of equity.

Mr. Greene and *Mr. Archibald Smith*, after opening the demurrer, were stopped by the Court.

Mr. Fooks and *Mr. F. H. Colt*, for the plaintiffs, contended that the intention of the testator was clear; the only question was whether the children of Mary Crook were sufficiently 'described' in the will. Upon the authority of *Wilkinson* v. *Adams*, 1 V. & B. 460; *Beachcroft* v. *Beachcroft*, 1 Mad. 430; and *Holt* v. *Sindrey*, 38 Law J. Rep. (N.S.) Chanc. 126, the plaintiffs were entitled to the declaration.

Mr. J. H. Palmer, for Robert Crook, supported the view taken by the plaintiffs, and argued that he also was meant to take with them.

STUART, V.C., held, that having regard to the decision of *Harris* v. *Lloyd*, Tur. & Russ. 310, the plaintiffs and Robert Crook were not entitled to the declaration prayed by the bill, and allowed the demurrer, with costs out of the estate.

JAMES, V.C. July 19. } *In re* GARDNER'S TRUSTS.

Will—Construction—'Legal Personal Representatives for their own Use and Benefit.'

Petition to obtain a decision as to the construction of the will of John Gardner, deceased.

Testator, by his will, after giving a life interest in personal estate to his daughter Elizabeth Lane and her children, directed that in case any of the children of his said daughter should die during the lifetime of their mother, having previously attained the age of twenty-one years, the share of such deceased child in his estate and effects should, after the death of his said daughter, 'belong to and be receivable by the legal personal representative of such deceased child for his, her, or their own use and benefit.'

A question was raised whether under this bequest the respective executors and administrators of several children who had attained twenty-one and died in Mrs. Lane's lifetime were beneficially entitled to the shares of such children.

Mr. Hardy and *Mr. Cutler* supported the petition.

Mr. Amphlett, *Mr. Balmer*, *Mr. Willcock*, *Mr. Byrne*, *Mr. Kay*, *Mr. Everitt*, *Mr. Hinde Palmer*, *Mr. Dauney*, *Mr. F. Bacon*, and *Mr. Taylor* appeared for the several respondents.

JAMES, V.C., decided that the shares of such deceased children passed under the above words to their next of kin, and not to their executors or administrators.

STUART, V.C. July 14, 19, 20. } GIFFORD *v.* WILLIAMS.

Partition Suit—Plaintiffs' Title (a Legal One) Disputed by Defendants—Jurisdiction—Evidence—Decree.

The bill in this suit prayed a declaration that the plaintiffs were entitled to an undivided moiety of a field in Wales, called Wereglodd Fudog, for a partition of the field, and for ascertaining (if necessary) the boundaries of the moiety of the field.

Mr. Fry and *Mr. Coyens Hardy* were for the plaintiffs.

Mr. O'Morgan and *Mr. Williams* (of the Common Law Bar), for the principal defendants, took a preliminary objection to the plaintiffs' right to institute the suit. They said their title was a purely legal one, and was disputed by the defendants. The real object of the plaintiffs was to make this suit the means of getting the decision of this Court upon their title, which was properly triable at law only, before a jury.—*Potter* v. *Waller*, 2 De G. & Sm. 410; *Slade* v. *Barlow*, 38 Law J. Rep. (N.S.) Chanc. 369, s.c. 7 Law R. Eq. 296; *Bolton* v. *Bolton*, 7 Law R. Eq. 298.

In *Bolton* v. *Bolton* this Court ordered the bill in the suit to stand over for a twelvemonth, with liberty to the plaintiff to bring an action at law to try his right, and they said the plaintiffs were only entitled to a similar decree now. Moreover, a great deal of their evidence in this case was made up of entries by deceased stewards of payments of rent by the defendants' ancestors to them, for the plaintiffs and their ancestors, and the admission of that evidence was objected to on the authority of *Price* v. *Lord Torrington*, 1 Smith's L. C. 277.

Mr. Palmer was for other parties.

STUART, V.C., admitted the evidence to which objection had been taken; and being of opinion that the plaintiffs had thereby proved their title to so much of the field as they sought by their bill to affect, made a declaration of title, and a decree for the partition of the property, as prayed, with costs.

JAMES, V.C. July 16. } HARROLD *v.* MARKHAM.

Injunction—Pollution of River—Unusual Weather—Plaintiff Adding to Nuisance—Cessation of Nuisance after Bill Filed—Right to Relief not Lost thereby.

Bill for injunction against the clerk of the Improvement Commissioners of Northampton (not under the Local Government Act 1858), on the ground that their drainage system resulted in large quantities of sewage matter being poured into the river Nene above the

plaintiff's mill, causing thereby a very offensive smell. The evidence showed that the nuisance had been very serious during the unusually hot and dry weather of Sept. 1868, but was not (as the Court considered) sufficient to require judicial interference at other times; and that it was much aggravated on Monday mornings, owing to the plaintiff's mill being stopped on Sunday, thereby causing an accumulation of filth immediately above the sluice-gates. There was evidence, on the part of the defendant, that the water at a point between the outfall and the plaintiff's mill seemed tolerably pure to the eye; but, on the other side, there was scientific evidence to the effect that such comparative purity was not inconsistent with the presence of elements which would afterwards undergo putrefaction, and become very offensive.

Mr. Willcock and *Mr. Renshaw* for the plaintiff.

Mr. Amphlett, *Mr. Webster*, and *Mr. Dryden* for the defendants.

On the question whether an injunction would issue when the nuisance had been discontinued since the institution of the suit, *Mr. Everitt* (*am. cur.*) mentioned a case (not reported on appeal) in which the Lord Chancellor directed two distinct issues, (1) the injury before, (2) the injury after bill filed.

James, V.C., was of opinion that the plaintiff had a right to be protected from nuisance in dry years as well as in wet years, and was therefore entitled to a decree notwithstanding that the nuisance was due to the peculiar weather of last summer. No doubt the plaintiff had himself added to the nuisance by blocking up the river on Sunday, but he had a perfect right to do so, and the defendants had no right to deprive him of the additional water-power so obtained on Monday morning. There must, therefore, be an injunction (with costs) against pouring sewage into the river so as to create a nuisance to the plaintiff.

Mr. Amphlett then asked for time to be allowed the defendants for any alterations that might be necessary.

His Honour did not think there was any nuisance at present, and therefore should not be likely to consider the non-alteration of the works a breach of the injunction; but he had no objection to add the words, 'but not so as to compel the defendants to make any alteration or addition to the works before June 1 next.'

James, V.C. July 8. | Attorney-General *v.* The Mayor, &c., of Halifax.

Injunction — Sewage — Stream already Foul — Plaintiff Adding to Nuisance—Acquiescence—Expected Legislation.

This was a bill and information to restrain the above corporation from pouring the sewage of the borough into the Hebble brook, so as to be a nuisance to the plaintiffs or the public generally. The plaintiffs and relators were Messrs. Holdsworth, damask and worsted manufacturers, whose mills were about 160 yards below one and about 80 yards below the other of the outfalls through which the sewage was discharged. The defences were (1) that the brook had for the last fifty years, or at all events long before the new drainage system complained of was introduced, been a foul stream totally unfit for drinking or domestic purposes, and that, as shown by chemical analysis, it contained actually less organic matter below the outfalls than above them—the additional water stored in flood-time, and sent down the sewers at regular intervals, more than compensating for the amount of sewage matter sent down with it; (2) that the plaintiffs themselves added largely to the nuisance by the manufacturing refuse from their works and by the drainage from the cottages of their workmen; (3) that the plaintiffs were estopped from complaining by their own acts, inasmuch as one of them, William Irving Holdsworth, had been a member of the Town Council since 1860 (the main sewer was completed in 1858, but had only gradually become connected with the house drainage of the town generally), had been mayor between 1863 and 1865, and had given evidence before the House of Commons in favour of the Halifax Improvement Extension Act, the effect of which was to treble the area of the drainage system complained of; (4) that the evil could only be dealt with effectually by a comprehensive scheme, and that no such scheme could safely be adopted before the appearance of the expected report of the Rivers Pollution Commission, which would probably be followed by legislation.

Mr. Kay and *Mr. Ince* for the plaintiffs.

Mr. Grove, *Mr. Amphlett*, *Mr. Bristowe*, and *Mr. Williamson* for the defendants.

James, V.C., said that the Hebble had no doubt been a foul, turbid, and dirty stream for many years past, but it had been free from the particular offensive odour which the witnesses described as now existing. The analysis taken by Dr. Letheby was wholly irrelevant, failing as it did to distinguish between the fæcal matter brought down by the sewer and other impurities, of which a large amount might be comparatively innocuous. As to the alleged addition by the plaintiffs themselves, the effect of a stream flowing past 1,000 cottages would not for a moment be compared with the offensive excretions of 60,000 people. The argument that W. T. Holdsworth, by promoting the Parliamentary extension of the borough, had assented by implication to the extension of the sewage, had no foundation. A gentleman might think such a measure desirable on public grounds without therefore giving up his property to the borough, or his right to stop what might afterwards prove a nuisance. And even if he were so estopped, his co-owners were not. He should therefore have no hesitation in stopping the extension of the system immediately; and he should make a further injunction restraining the Corporation, from and after June 1, 1870, from causing or permitting the sewage of Halifax to pass through the present or any new outfalls unless the same be sufficiently purified and deodorised. This would give the Corporation time to apply to Parliament; and he was satisfied that, if they really tried, they would find a way of removing the practical inconvenience.

James, V.C. July 17. | *Re* Duggan's Trusts.

Assignment of Future Interest—Presumptive Next of Kin —Spes successionis.

Under the will and codicil of Charlotte Duggan, a sum of 10,000*l.* was vested in trustees upon trust for Charlotte Alington Pye for life, for her separate use, then for her children (if any) on their attaining twenty-one, or if daughters, marrying; and in the event (which happened) of her not having any issue who should live to acquire a vested interest, then the fund was to go to her (the legatee's) next of kin. Charlotte Alington Pye survived the testatrix, and died in January 1869 without issue, and leaving her father, Henry

Pye, her next of kin. The said Henry Pye had, as co-trustee with the petitioner, made away with trust-moneys amounting to more than 10,000*l.*, for which the petitioner was responsible: on discovery whereof the petitioner had, by strong and hostile pressure, compelled him to execute, on July 17, 1868, a deed whereby he transferred and assigned to the petitioner 'all that his interest of and in the said sum of 10,000*l.* so bequeathed by the said will and codicil as therein aforesaid, to hold the same unto the petitioner, his executors, administrators, and assigns absolutely, for securing nevertheless such sum of 10,000*l.* and interest as aforesaid,' with a covenant for payment and for further assurance. The said Henry Pye executed, some hours later on the same day, a deed whereby he conveyed all his estate and effects to trustees for the benefit of his creditors, which was duly registered; and he absconded the same evening. On the death of Charlotte Alington Pye, the fund (except a part retained by the trustees in respect of a debt due from Henry Pye to the testatrix) was claimed on the one hand by the petitioner, and on the other by the Lincoln and Lindsey Bank as creditors under the second deed of assignment, and the trustees therefore paid it into Court. The first-mentioned deed having (in the opinion of the Court) been executed for adequate consideration, and not by way of fraudulent preference, the chief question was whether it was capable of passing such a contingent interest as Henry Pye had at that time.

Mr. Amphlett and *Mr. Jason Smith* for the petitioner.

Mr. Willcock and *Mr. Nalder* for the Lincoln and Lindsey Bank.

Mr. H. F. Shebbeare for the trustees.

James, V.C., thought that the deed would not have carried a mere *spes successionis*, but that Henry Pye's interest at the date of its execution was rather more than that, and therefore passed by it, but that the trustees were quite justified in paying the money into Court.

James, V.C. July 17. } *Re* The Anglo-Egyptian Co. (Lim.)

Winding-up Petition—'Just and Equitable'—Costs.

This was a petition for winding up the company under the 'just and equitable' clause (s. 79, 5) of the Companies Act, 1862. The company was formed in 1865 to work a line of steamers between Liverpool, Egypt, and Syria. The nominal capital was 500,000*l.* divided into 20*l.* shares; of this 205,187*l.* 10*s.* had been paid up, out of which 133,628*l.* 13*s.* 4*d.* had been lost. Of the company's nine steamers seven had been sold, one lent to a telegraph company, and the remaining one was employed in connection with a line of steamers belonging to another company; and, moreover, a guarantee of 10 per cent. dividends for five years had been lost by the bankruptcy of the guarantors. The petition was presented on behalf of the National Bank of Liverpool, as holders of 1,650 fully paid-up shares; it alleged that there was no prospect of a dividend for at least ten years to come, nor at all unless the company were vigorously worked, and that could not be done without a call to the full extent of the unpaid capital, which the shareholders had recently refused to make; whereas by winding up now a considerable sum might be divided among the shareholders.

Sir R. Palmer, *Mr. Kay*, and *Mr. Fischer*, in support of the petition, represented that it was unjust and inequitable to carry on the company entirely at the expense of the paid-up shareholders, who had the misfortune to be a minority.

Mr. De Gex and *Mr. Marten* for Thomas Stephen, another holder of paid-up shares, supported the petition.

Mr. Wickens for the company, and

Mr. Fry and *Mr. Davey* for shareholders opposing the petition, were not heard, except as to costs.

James, V.C., refused the petition with costs. To interfere in such a case would amount to making himself the judge when it was proper to make a call; and as to the complaint that the company was being carried on by the majority at the expense of the minority, that was part of the bargain they entered into when they took their shares. They ought to have insisted, before joining the company, on the common proviso for dissolving the company on half the capital being lost, or the like. On the question of costs, the rule was that under no circumstances should more than one set of costs be given to one class, as creditors or shareholders, &c.; but here, the ground of the petition being that the majority of the shareholders were unfairly oppressing the minority, the majority had a right to appear separately from the company, and he should allow them collectively a distinct set of costs.

James, V.C. July 21. } *In re* European Central Railway Co. (Limited). Parsons and Spong.

Company—Winding-up—Infant Transferee of Shares Retained on Register—Laches.

This was an application upon adjourned summons, on behalf of the official liquidator of the above-named company, to substitute the name of Parsons for that of Spong in respect of twenty shares in the company. The company was formed in January 1864. In August 1864, 130 shares were allotted to Parsons. In September 1864 he transferred twenty of these shares to Spong, then an infant. In October 1864 a call of 2*l.* per share was made on Parsons, but he repudiated his liability in respect of the shares transferred to Spong. The company, in May 1865, commenced an action against Spong in the Queen's Bench for the purpose of enforcing this call against him. In July 1865 Spong put in a plea of infancy; thereupon nothing further was done in the action. In January 1868 an order was made for winding-up the company. In October 1868 Spong attained twenty-one.

Mr. Kay and *Mr. Bardswell*, in support of the application, argued that upon the winding-up of the company the contract between Parsons and Spong, which before had been voidable, became void, and it was the duty of Parsons to have seen that his transferee was a person capable of holding the shares.

Mr. Willcock and *Mr. F. H. Law*, for Parsons, were not called upon.

James, V.C., said when the company knew in 1865 that Spong was an infant, it was their plain duty to take steps to have his name removed from the register, and not to have kept the fact concealed from Mr. Parsons. He held that the company were prevented by their *laches* from now putting Mr. Parsons on the register.

ERRATUM.

Note.—In *Stuart* v. *Cockerell*, *antè*, p. 188, in the judgment, read 'the stop-order obtained afterwards was *not* too late,' and 'the assignees in bankruptcy were *not* entitled to these dividends.'

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Privy Council. June 30. { JEAN BAPTISTE GIRAUD (APPELLANT) *v.* JOHN BORTHWICK PATERSON (RESPONDENT).

Present: Sir W. ERLE, Sir J. COLVILE, Sir J. NAPIER, and Lord Justice GIFFARD.

Practice—Appeal—Action at Law—Nominal Damage.

This was an appeal from a judgment of the Supreme Consular Court at Constantinople.

The suit was originally brought by the appellant in the Court at Smyrna, to recover damages in consequence of his being, as he alleged, wrongfully deprived of a certain farm and of the stock thereon.

The case afterwards came before the Consular Court at Constantinople, where there was a great conflict of evidence. The Consular Court, however, gave judgment that appellant had not established his right to the damages claimed. From this judgment the present appeal was brought.

Mr. Quain and *Mr. Bere* for the appellant.

Mr. Manisty and *Mr. Butt* for the respondent.

Sir W. ERLE:—This being a suit in which damages

alone are claimed, even if it appeared to their LORDSHIPS that the appellant was entitled to nominal damages, that species of damage would be no ground before this committee to recommend that the judgment of the Court below should be reversed. Their LORDSHIPS will therefore recommend that this appeal be dismissed, with costs.

Privy Council. July 19. THOMAS CHERRY AND ANOTHER (APPELLANTS) *v.* THE COLONIAL BANK OF AUSTRALASIA (RESPONDENTS).

Present: Sir J. COLVILE, Sir J. NAPIER, and Lord Justice GIFFARD.

Principal and Agent—Representation of Agent—Implied Warranty of Principal.

This was an appeal from a judgment of the Supreme Court of Victoria. The appellants were two directors of the Loch Fyne Quartz Mining Company. The respondents were a banking corporation carrying on business in Melbourne. The action was brought by the respondents to recover 4,127*l.* 18*s.* 5*d.*, the amount paid by the bank on cheques drawn by one Charles Ernest Clarke, whom the appellants had authorised to draw cheques upon the account of the company. The declaration stated that in consideration that the respondents, at the request of the appellants, would honour the cheques of the said C. E. Clarke, the appellants promised that the said C. E. Clarke was duly authorised to make cheques for them. The appellants pleaded several pleas, and their fourth plea alleged that the promise was in the words following:—

Woods Point, Dec. 4, 1865.

The Manager of the Colonial Bank of Australasia, Matlock.

SIR,—We have to inform you that we, as directors of the Loch Fyne Quartz Mining Company, have appointed Mr. Charles Ernest Clarke to be legal manager of the company, and have authorised him to draw cheques upon the account of the said company.

We remain, Sir, yours truly,
THOMAS CHERRY,
JOHN M'DOUGALL.

and for a fifth plea that, as to 4,000*l.*, part of the money claimed, the cheques of the said C. E. Clarke were drawn by way of overdraft, and that there was not at the time of their being drawn any money standing to the credit of the company.

The respondents joined issue on these pleas. The cause was tried on June 4, 1867, when it appeared that the account of the company was overdrawn at the time the letter set out in plea was written, of which the appellants had notice; that the appellants did not form a quorum of the directors, and were not empowered to give the said C. E. Clarke the authority mentioned in their letter. Upon these facts the jury found a verdict for the respondents.

On June 27, 1867, a rule *nisi* was obtained by the appellants to enter a nonsuit on the ground principally that the said C. E. Clarke had no authority to overdraw on the funds of the company, and that there was no evidence of any personal liability in the appellants.

On September 6, 1867, the Supreme Court gave judgment in favour of the respondents.

Mr. Mellish and *Mr. Griffits* for the appellants.

Sir J. Karslake and *Mr. Macnamara* for the respondents.

Sir J. NAPIER:—It appears to their LORDSHIPS that there was evidence upon which it was open to the jury to act. The warranty which the law implies depends on the position of the parties, and on the nature and effect of the representation. Their LORDSHIPS will recommend that the judgment of the Supreme Court be affirmed.

Privy Council. July 20. THE BISHOP OF CAPETOWN (APPELLANT) *v.* THE BISHOP OF NATAL (RESPONDENT).

Present: Sir W. ERLE, Sir J. W. COLVILE, Sir J. NAPIER, and Lord Justice GIFFARD.

Natal—Roman Dutch Law—Crown Grant, Construction of—Ejectment.

This was an appeal from a judgment of the Supreme Court of the colony of Natal.

The proceedings in the Supreme Court of the colony arose out of an action brought by the respondent, as Bishop of Natal, against the appellant, the Bishop of Capetown.

The declaration stated that a grant was made by Her Majesty the Queen of certain freehold land in the colony 'unto the Right Reverend Father in God, Robert Lord Bishop of Capetown, and his successors of the said see, in trust for the English Church at Pietermaritzburg, in Natal, with full power and authority to possess the same in perpetuity. The declaration then stated that the appellant took possession of the said land for the said purpose, and possessed the same until the see of Capetown was dissolved, and thereout was created three sees—viz., the see of Capetown, the see of Natal, and the see of Grahamstown—and that the respondent was appointed bishop of the said see of Natal, and thereby became the successor in the said see of Robert Bishop of Capetown, the appellant. The declaration then alleged that the appellant, the said Bishop of Capetown, continued to keep adverse possession of the said freehold land and the building erected thereon, to wit, the cathedral church of St. Peter's. The declaration then prayed that the appellant might be ejected from the possession of the same, and that the said grant be amended by substituting the respondent's name and his successors.

The appellant pleaded to this declaration, putting in issue all the facts alleged in the declaration. Issue was joined thereon.

The Supreme Court gave judgment for the respondent, and decreed 'that the land in question and the buildings thereon do now stand vested in the respondent in his corporate capacity, and his successors in office as Bishop of Natal.'

From this judgment the present appeal was brought.

Sir R. Palmer and *Mr. Charles* for the appellant.

Mr. Wickens and *Mr. Westlake* for the respondent.

GIFFARD, L.J., delivered the judgment of their LORDSHIPS:—Their LORDSHIPS are of opinion that the respondent is entitled, as between him and the appellant, to a judgment to some extent in his favour. That the respondent has, as against the appellant, a right to have access to the church erected on the land granted to the appellant and his successors. The actual estate in the land could not, in our opinion, be properly dealt with in the present suit; but as we are of opinion that the appellant has no estate, and was wholly wrong in th course he took, we shall advise Her Majesty that no costs of appeal be given.

Courts of Equity.

LORD ROMILLY, M.R. July 16. } *In re* SOUTH BLACKPOOL HOTEL Co. JAMES'S CASE.

Debenture—Set-off—Covenant to Indemnify.

Mr. James was the assignee of debentures from Mr. Carter, and took them subject to the equities subsisting between Mr. Carter and the company.

It was provided by the articles of association that Mr. Redmond, a nominee of Mr. Carter, should indemnify the directors against the expenses of promotion, and Mr. Carter was bound by this indemnity. The directors had incurred such expenses to the amount of 208*l.*, and the question was whether this sum could be set off against the amount due on the debentures.

Mr. Jessel and *Mr. Gardiner*, for Mr. James, argued that it could not, since the breach of a covenant to indemnify conferred a right to recover damages, and till the damages were ascertained nothing could be set off.

The MASTER OF THE ROLLS, without calling on *Mr. Ford North*, who appeared for the official liquidator, allowed the set-off.

LORD ROMILLY, M.R. July 22. } *In re* JOINT STOCK DISCOUNT Co. BUTCHER'S CASE.

Company—Transfer of Shares by Director—Registration—Directors' Discretion.

This was an application by Mr. Bravo that the name of Mr. Butcher might be put on the list of contributories in place of his own. The transfer of shares to Mr. Butcher had been executed and lodged with the secretary in time for it to be registered in due course before the winding-up commenced, but it was never registered.

The directors, however, had a discretionary power to refuse their assent to transfers made for purposes not conducive to the interests of the company. Mr. Bravo was a director.

Mr. Southgate and *Mr. Robinson* were for Mr. Bravo.

Sir R. Baggallay and *Mr. Wickens* for Mr. Butcher.

Mr. Jessel and *Mr. Locock Webb* for the official liquidator.

The MASTER OF THE ROLLS held that the name of Mr. Butcher could not be put on the list. It might be at variance with the interests of the company to permit a director to transfer his shares, and the directors therefore were not compellable to register the transfer. Mr. Butcher, however, was bound to indemnify Mr. Bravo.

LORD ROMILLY, M.R. July 22. } *In re* JOINT STOCK DISCOUNT Co. SOLLIEUX'S CASE.

Company—Transfer—Absence of Seal—Registration.

This was an application by Messrs. Adamson & Ronaldson that the name of Mr. Sollieux might be placed on the list in place of theirs. The transfer of their shares to Mr. Sollieux had been left in due time with the secretary, but never registered. It appeared that although the acceptance of the transfer by Mr. Sollieux was attested as 'signed, sealed, and delivered' by him, there had never been any seal or mark for a seal. It was necessary that the transfer should be accepted by deed.

Mr. Swanston and *Mr. Jackson* appeared for Messrs. Adamson & Ronaldson.

Mr. Marten for Mr. Sollieux.

Mr. Jessel and *Mr. Locock Webb* for the official liquidator.

The MASTER OF THE ROLLS held that the directors were not compellable to register such a transfer, and dismissed the summons.

LORD ROMILLY, M.R. July 23, 26. } *In re* AGRICULTURIST CATTLE INSURANCE Co. DIXON'S CASE.

Company—Compromise with Shareholder—Lapse of Time.

This was a summons to remove the name of Mr. Dixon from the list of contributories. Mr. Dixon's name had been removed from the list of shareholders in April 1849, but the official liquidator had put it on the list of contributories on the ground that this removal was improper.

Mr. Dixon had become a shareholder on the faith of representations which were never made good, and in the year 1846 he received a dividend. In 1848 he claimed to be released from his shares. In that year he received notice of a call, which he never paid; and on April 17, 1849, the directors agreed to a compromise not within their power, by which he was to pay 40*l.* and be released from his shares.

The case of the official liquidator was that the directors had no power to make this compromise.

Sir R. Baggallay and *Mr. G. N. Colt* appeared for Mr. Dixon.

Mr. Southgate and *Mr. Bush* for the official liquidator.

July 26.—The MASTER OF THE ROLLS said that he should not attempt to reconcile the conflicting dicta of the House of Lords, and held that Mr. Dixon's name ought to be removed from the list. The directors had a power to compromise, and if it had been wrongly exercised the shareholders might have applied in the course of the twenty years which had passed to set it aside.

STUART, V.C. July 10. } COLLINS *v.* LEWIS.

Will—Pecuniary Legatees—Residuary Devisee—Insufficient Personalty—Contribution—Hensman v. *Fryer*, 37 *Law J. Rep.* (N.S.) *Chanc.* 97; *Law Rep.* 3 *Chanc.* 420, *not followed.*

This was a suit to administer the real and personal estate of James Dew, who died in the year 1864. The testator by his will bequeathed certain pecuniary legacies, and devised a freehold messuage and lands in Gloucestershire to the use of his wife for life, and after her death to his executors in fee; and the testator devised and bequeathed all the residue of his real and personal estate to his executors, and directed them to stand possessed thereof, and also of the lands in Gloucestershire in trust for his niece for life, with remainder to her children.

The personal estate was insufficient to pay the tes-

tator's debts, and the question was whether the pecuniary legatees were entitled to throw the payment of the whole or any portion of their legacies on the real estate.

Mr. Charles Browne for the plaintiff.

Mr. T. Hughes, for the trustees, contended that upon the authority of *Hensman* v. *Fryer*, 37 Law J. Rep. (N.S.) Chanc. 97; Law Rep. 3 Chanc. Ap. 420, where the personal estate is insufficient for the payment of debts, the pecuniary legatees and the residuary devisee contribute rateably to the payment of them.

Mr. Bedwell for the widow of the testator.

The pecuniary legatees had been served, but did not appear.

STUART, V.C., considered that the decision in *Hensman* v. *Fryer* was not in accordance with the prior authorities, and being clearly a mistake, his HONOUR declined to follow it. There must be a declaration that the pecuniary legatees had no claim on the real estate of the testator.

STUART, V.C. July 22. } CHEESEWRIGHT *v.* THORN.

County Court Practice—Administration Plaint—Statement of Value of Estate—Jurisdiction.

This plaint was filed by beneficiaries under a will against the executor, to obtain an order for the administration of the estate, and to charge him with a sum of 400*l.* in respect of a policy on the life of the testator. The plaint contained statements that the defendant had possessed himself of the personal estate of the testator to the value of 100*l.* or thereabouts, and that the testator was entitled at his death to a sum of 400*l.*, secured upon a policy on his own life, subject to a charge of 145*l.* thereon; but it did not contain any specific statement that the personal estate did not exceed in amount or value the sum of 500*l.*

The County Court judge decided in favour of the plaintiffs, and the defendant appealed, and one of the grounds of appeal was that it did not appear upon the face of the plaint that the estate to be administered was under the value of 500*l.*

Mr. Dauney for the appellant.

Mr. T. Hughes for the respondent.

STUART, V.C., considered that it was not necessary that an administration plaint should contain a statement that the estate to be administered did not exceed in amount or value the sum of 500*l.*

STUART, V.C. July 27. } GIBBS *v.* HARDING.

Husband and Wife—Agreement to Live Apart, for the Execution of a Separation Deed, and for Securing an Annuity on the Wife—Specific Performance of—Decree for.

On March 1, 1857, Thomas Archer Harding married Alice Gibbs, the daughter of the plaintiff, Joseph Gibbs. No settlement was then executed. There were issue of the marriage four children, of whom three died before 1865. On July 5, 1865, an agreement was entered into between Thomas Archer Harding of the one part, and Joseph Gibbs of the other part, reciting that differences having arisen between T. A. Harding and Alice his wife, it had been agreed between T. A. Harding and Joseph Gibbs, on behalf of his daughter, that T. A. Harding and his wife should live apart; and T. A. Harding thereby agreed with Joseph Gibbs, when thereunto required, to execute and sign a deed of separation to be prepared by Messrs. Bradford & Foote, to contain all usual and proper clauses, and also to secure the sum of 40*l.* a year, to commence from the date of that agreement, and to be paid by equal quarterly payments by T. A. Harding for the maintenance of his wife and child; but if the wife should then be in the family way, and have another child within eight months from that time, then the sum of 40*l.* should be increased to 50*l.* to be paid in like manner as the 40*l.* provided, for so long as such child should live; and the cost of the deed of separation and of that agreement should be paid in equal portions by the parties thereto. The agreement was signed by Thomas Archer Harding and Joseph Gibbs, and also by Mrs. Harding. She was not in the family way at the date of the agreement, and had no child born since then. She separated from her husband, and lived with and was maintained by her father until October 12, 1865, when she left him and went into a situation as a domestic servant. The child was, however, maintained by the plaintiff Joseph Gibbs. He then, in pursuance of the agreement, prepared a deed of separation; by which it was, among other things, proposed that the annuity of 40*l.* a year should be secured—(*a*) by charging it on some land at Wanborough, to which T. A. Harding was entitled in fee; and (*b*) by a covenant by him to pay it for the term of 99 years, 'if his wife should so long live.' The proposed deed contained no covenant on the part of Joseph Gibbs to indemnify T. A. Harding against his wife's debts. The deed was engrossed, but T. A. Harding was advised that he could not safely execute it; and he accordingly refused to do so. Some negotiations took place between Joseph Gibbs and T. A. Harding as to the commutation of the annuity for a sum of 500*l.*, which T. A. Harding refused to agree to, though he offered to pay 350*l.* He, however, alleged by his answer that he had paid the annuity regularly up to October 1867; but that, on his then tendering the 10*l.* for that quarter, it was refused by Joseph Gibbs, or his solicitor, as was also the payment for the next quarter, which was tendered in January 1868. These allegations were disputed by the plaintiffs, and ultimately, early in 1868, the bill in this suit was filed, praying (*inter alia*) a decree for the specific performance by T. A. Harding of the agreement of July 6, 1865, for the execution by him of a proper separation deed, and for duly securing the annuity.

The plaintiffs in the suit were Joseph Gibbs and Mrs. Harding by her father as her next friend; and the defendants were T. A. Harding and his infant child.

Mr. Greene and *Mr. Bagshawe* were for the plaintiffs.

Mr. Dickinson and *Mr. W. W. Karslake*, for the defendant T. A. Harding, contended that the case ought never to have been brought into Court. The agreement by the father that Mr. and Mrs. Harding should live apart was contrary to public policy; Mrs. Harding was not a party to or bound by the agreement, and there was no mutuality in it as between Joseph Gibbs and T. A. Harding. The proposed deed was not in accordance with the terms of the contract, or justified by it. There was no proper consideration for the contract; and the whole matter was purely voluntary, and one which this Court would not enforce.

Mr. A. G. Langley was for the infant.

STUART, V.C., said:—Mrs. Harding was as much bound by the agreement of July 5, 1865, as a married woman could be. The agreement itself had been acted upon by

the father, who was now maintaining the child of the marriage; and where an agreement had been acted upon by the parties to it, this Court would, if it were not in other respects an improper or illegal one, enforce the performance of it. The proposed deed was certainly not justified by the terms of the contract; as there was nothing in that to render it necessary for T. A. Harding to charge his real estate with the annuity. It might have been well for him, perhaps, if he had executed the deed, or if he would even now do so. But if he would not, there must be a reference to Chambers to settle a proper separation deed, and for the due security of the annuity. Upon the whole case—though with great reluctance—a decree must be made for the specific performance of the agreement as prayed by the bill; and T. A. Harding must pay the costs of the suit.

MALINS, V.C. July 15. } *In re* WOODARD, A SOLICITOR.

Practice—Taxation—Special Circumstances—G. O. of April 17, 1867.

Mr. Cutler moved that Mr. Woodard be ordered to attend before the examiner to be cross-examined with reference to the taxation of certain bills of costs.

Mr. Glasse opposed, on the ground that notice had not been given within fourteen days of the filing of Woodard's affidavit.

The VICE-CHANCELLOR observed that the summons was for the taxation of bills of costs which had been paid some years back. Such a matter ought to have come before the Court itself by petition showing special circumstances, and not by summons before the chief clerk, 6 & 7 Vict. c. 73, s. 37. His HONOUR'S attention was called to G. O. of April 17, 1867, rule 1, ordering that all applications for taxation be made by summons; but he held that even then the summons should show special circumstances; there were none shown here, and he should make no order on this application.

MALINS, V.C. July 20. } COOPER *v.* LAROCHE.

Conversion, Trust for—Interim Proceeds of Estate—Profits of Sale—Tenant for Life and Remainderman.

Testator died in 1860, having by his will directed trustees (of whom his wife was one) to allow his estate to remain in its then state of investment, so long as they should see fit, and subject thereto to convert it into money, pay 2,000*l.* to his widow, invest the residue, and then pay her the annual produce thereof during her life, and after her decease over. His estate consisted *inter alia* of partnership shares in certain ships, and also of a partnership share in a mine. The estate was advantageously converted within a year and a half after testator's decease, but in the interim the ships in question had earned freight, and a dividend had been paid on the mine.

Mr. Cotton and *Mr. Hull* for plaintiffs, trustees of the will.

Mr. Glasse and *Mr. C. Russell*, for the remainderman, contended that the widow was not entitled to anything but interest on the value of testator's estate at the time of his death.

Mr. J. Pearson and *Mr. Cracknall*, for the widow of the testator, tenant for life under the will, contended that she was entitled to all profits arising from the sale of the ships and to their interim earnings, and to the interim dividends on mines, &c.

The VICE-CHANCELLOR said the case was concluded by authority. The profits produced by the sale of the estate, as well as the annual produce before sale, were to be treated as capital, for the general benefit of the estate. The widow was therefore not entitled to anything but interest thereon.

MALINS, V.C. July 8, 13, 22. } COOKE *v.* HATHWAY.

Practice—Costs—Bankrupt Plaintiff—Proceedings Stayed till Payment by Assignees of Costs previously Incurred by Bankrupt Plaintiff.

The plaintiff in this cause presented a petition in the suit, which petition was dismissed with costs, and he having subsequently become bankrupt, the suit was revived by his assignees.

The costs of the petition still remaining unpaid, the defendants now moved to stay proceedings in the suit till payment of such costs by the plaintiff's assignees.

Mr. Glasse and *Mr. C. Hall* for the motion.

Mr. E. K. Karslake and *Mr. Mander* for the assignees.

The VICE-CHANCELLOR said that, upon principle as well as authority, the assignees were bound to pay these costs, and made the order asked.

MALINS, V.C. July 22. } RAMSBOTHAM *v.* SENIOR.

Practice—Solicitor and Client—Privilege of Solicitor—Confidential Communications—Concealment of Ward of Court.

This case resembled the preceding. A lady, the testamentary guardian of two infants, a son and daughter, twins, now fifteen years old, had absented herself, in disregard of various orders of the Court with reference to the children, who had become its wards, and after undertaking not to hide herself away from the trustees, had lately removed the son from a school at which he had been placed by the VICE-CHANCELLOR, and could not now be found.

Mr. Patterson, her solicitor, had received various letters from her, which bore no address, and he did not know where she was; but an application was made in Chambers for production of the envelopes of those letters, in the hopes that the postmarks upon them might give a clue to the discovery of the lady. This was refused by Mr. Patterson on the ground of privilege, and the matter was adjourned into Court.

Mr. Prendergast and *Mr. Renshaw* supported the application.

Mr. J. Pearson and *Mr. Wickens* opposed it.

The VICE-CHANCELLOR said the argument in this case had confirmed him in the opinion he had expressed in *Burton* v. *The Earl of Darnley*. If Mr. Patterson had known where his client was he should have required him to disclose her address, and he must now produce the envelopes in question.

MALINS, V.C. July 22. } BURTON *v.* THE EARL OF DARNLEY.

Practice—Solicitor and Client—Privilege of Solicitor—Confidential Communication—Absconding with Ward of Court.

This and the following case raised an important question with reference to the privilege of a solicitor in regard to confidential communications between himself and his client.

The COURT had appointed a guardian of an infant, now fourteen years old, and entitled to a large property, on the ground that the mother was not bringing up the child in a manner consistent with the fortune to which she was entitled. The mother, however, in disregard of the order, took the child away to Spain, and nothing further had been done until June last, when an order was made for delivery up of the ward, which was served by substituted service upon Mr. Alfred Markby, the mother's solicitor. This order being still disobeyed, Mr. Markby was subpœnaed and examined as a witness in Court, with the view of extracting from him where his client was residing.

Mr. Cotton (*Mr. Fischer* with him) having put questions to Mr. Markby with the object of getting the desired information, Mr. Markby declined to answer on the ground of privilege, and the matter was referred to the Court.

The VICE-CHANCELLOR was of opinion that he must answer the questions, whereupon Mr. Markby gave an address at which he had reason to believe the lady was to be found.

The VICE-CHANCELLOR subsequently stated that he wished it to be understood as deciding that no person, whether solicitor or officer of this Court or not, could be permitted to aid or abet any one in disobeying an order of the Court, or to refuse to answer any question which might enable the Court to gain possession of its wards. An order was then made against the mother to deliver up the child by eleven o'clock the following morning, or in default to stand committed for contempt.

MALINS, V.C. July 23. } *In re* CHAWNER'S TRUSTS.

Will—Power to Mortgage—Power of Sale—Verbal Contract—Conversion.

Petition by trustees, under Lord St. Leonard's Act, for the direction of the Court upon the following questions:—

1. A testator, who died in 1868, directed his trustees to raise a certain sum by mortgage of an estate; the proposed mortgagees now objected that the direction to mortgage given by the will did not enable the trustees to give a power of sale.

2. The testator had entered into a verbal contract for the sale of a small part of his estate shortly before his death. Nothing further had been done, except that the testator had ordered the timber on that part to be valued. The trustees desired the direction of the Court whether this contract should be carried out.

Mr. Wingfield submitted the questions to the Court.

The VICE-CHANCELLOR said, as to the first question, that the power of sale was incident to a mortgage; and, on the second question, that the verbal contract had not converted the property from realty into personalty, and that the trustees could not therefore carry out this contract in such a manner as to alter the will.

MALINS, V.C. July 28. } RADMORE *v.* GILL.

Practice—Bankruptcy of Plaintiff Trustee—Suit Defective—Addition of Assignee as Party.

This was a bill by a sole trustee for the purpose of relinquishing the trust, and offering to account.

Mr. Begg for the plaintiff.

Mr. Wickens, for the defendant, objected that the trustee had become bankrupt since the filing of the bill, and the suit was now defective for want of the presence of his assignee.

The VICE-CHANCELLOR suggested that, as the character of the plaintiff as trustee was not affected by the bankruptcy, it would be sufficient that the assignee be served with notice of the decree; but, after some discussion, his HONOUR decided that this course was not here practicable, and the matter must stand over, with liberty to amend by making the assignee a party.

JAMES, V.C. July 9. } *In re* HOTCHKISS'S TRUSTS.

Will—Construction—Gift to a Class and 'Children of such Members of the Class as may Die in my Lifetime,' Children of Person Dead at the Date of the Will not included—Re Potter's Trust, Law Rep. 8 *Eq.* 52.

The will of Thomas Hotchkiss contained the following clause: 'I give and bequeath the sum of 2,000*l.*, free of legacy duty, unto my first cousins either on my father's or mother's side, to be equally divided between them, and I give the share or shares of those my first cousins, if any, who may die in my lifetime, unto all and every the children of all my first cousins who may so die in my lifetime, share and share alike, such shares to be taken *per capita* and not *per stirpes*.' The only question discussed on this petition was, whether or not the children of a first cousin, who died before the date of the will, were excluded.

Mr. Kay and *Mr. Ford* for the petitioner.

Mr. Eddis, for the children of John Yapp, a first cousin, who died before the date of the will.

Mr. Hughes, *Mr. Haddan*, *Mr. Jackson*, and *Mr. Russell* for other claimants.

Mr. R. R. A. Hawkins for the executor.

JAMES, V.C., said that if the words of the will had been the same as in *In re Potter's Trusts*, Law Rep. 8 Eq. 52, recently decided by MALINS, V.C., he should have followed that decision without giving any opinion as to its correctness, at the same time expressing a wish that the matter might be brought before the LORD CHANCELLOR. But, in fact, there was a substantial and not a merely verbal distinction between the two cases. *In re Potter's Trusts* might have been decided on the ground that the gift was to a class which, according to a fair construction, might be held to consist of two distinct classes: first, the nephews and nieces then living; secondly, the issue of all nephews and nieces, whether living or dead at the date of his will. But here the class was clearly described and limited to first cousins living at the date of the will; and to read the clause as equivalent to 'I give the share or shares of any cousin who would have taken if living at my death,' would be introducing words of contingency which were not in the will at all. He added that his construction would have been the same if it had been an instrument *inter vivos*.

JAMES, V.C. July 17. } *Re* DYNE'S TRUSTS.

Power of Appointment—Release under Mistake of Law—Subsequent Appointment.

Margaret Fry—formerly Margaret Dyne, spinster—had (in the events which happened) a general power of

appointment, subject to her own life interest therein, over one-sixth of the residuary estate of her sister Sophia Dyne, there being a gift over to her (Margaret Fry's) next of kin in default of appointment.

By settlement on her marriage, dated August 29, 1826, she assigned all her power, right, estate, and interest in the principal of the said one-sixth part of the said residuary estate, upon trust, in the events, which happened, after the decease of the survivor of herself and husband, for her brothers and sisters, and the issue of such of them as should be dead, as she should by deed or will appoint, and in default of appointment, in trust for her said brothers and sisters and their issue as therein mentioned. And it was thereby expressly declared and agreed 'that the power of appointment vested in her by virtue of the will of the said Sophia Dyne should be deemed and considered as wholly released and extinguished by that indenture, and that the share and interest over which such power extended should be deemed and considered as part of the property comprised in the settlement.'

Margaret Fry survived her husband, and died in September 1868.

By her will, dated in 1853, she appointed her share in the estate of Sophia Dyne 'so far as the same was subject to the trusts of the said marriage settlement,' unto and equally between her great nephew William Brutton (since deceased) and her great niece Mary Ellen M'Callum absolutely; and she gave the residue of her personal estate to her cousin Henry Dyne, and appointed the said Henry Dyne and John James executors of that her will. They having paid the money representing the said one-sixth share into Court under the Trustee Relief Act, a petition was now presented by some of the persons entitled under the settlement in default of appointment, praying that the rights of all parties might be ascertained, and the fund paid over to such persons as should be found entitled to it.

Mr. B. B. Rogers, for the petitioners, contended that Margaret Fry's power of appointment was effectually destroyed by the release in the settlement.

Mr. Dyne for six respondents in the same interest,

Mr. Freeman for Henry Dyne, and

Mr. Williamson for the specific legatee, were heard only on the question who were entitled under the will.

JAMES, V.C. (without hearing the other side), was of opinion that the release was void; the lady fancying that she was entitled absolutely, assigned her interest to certain persons, and in so doing released her power of appointment. As it was, she was merely releasing to herself under a false apprehension of law. On the question who were entitled under the will, he could not, as he was asked to do, disregard the words 'so far as the same was subject to the trusts of the marriage settlement,' especially as it was clear she had been told that the fund in question was not subject to the trusts of the settlement. That being so, he was of opinion that the specific appointment did not take effect as to this fund, but that it passed under the residuary bequests to Henry Dyne. Costs of all parties out of the fund.

JAMES, V.C. July 19, 20. } HALDANE *v.* ECKFORD.

Domicile of Origin or of Adoption—Permanent Residence Abroad.

A Scotchman, having a Scotch domicile of origin some time before 1799, went to India, and with the exception of two several intervals, each of a duration of two or three years, during which he returned to Europe and travelled upon the Continent and in England, he resided at Bombay till 1832, holding there a medical appointment under the East India Company. In 1832 he retired on a pension, and returned to England; and soon afterwards he went to Jersey, where he took a house and was joined by his wife. For several years afterwards he continued to reside either in Jersey or at St. Servan, in France, where he was interested in a sugar refinery. About this time two children were born to him, both of whom died and were buried at St. Servan. From 1841 to 1845 he resided continuously in Jersey. In 1845 he paid a visit to Scotland, but returned to Jersey, saying he detested the climate of Scotland. In 1851 he removed the bodies of his two children from France to Jersey, where he buried them in a brick vault. Upon that occasion he asked the bricklayer whether there would be room for another coffin in the vault, and being answered in the affirmative, said that should be for him. His brother and his sister at his request came to live in Jersey. In 1863 he went to Scotland with the intention of buying an estate there, but returned to Jersey not having bought it, and declaring that the climate was too damp and bad. After his return he laid down a great quantity of wine in Jersey. Two years afterwards he died, and was buried in Jersey, having made his will and a codicil thereto, by which he directed the purchase of an estate in Scotland or elsewhere, to be entailed upon one of his grandsons and his issue, and by which he also left his grandson a legacy of larger amount if he should continue to reside in Jersey than if he should leave it. The question of domicile affected the construction of this will.

Mr. Amphlett and *Mr. Villiers* were for the plaintiffs, the trustees of the will.

Mr. Kay and *Mr. Eddis* and *Mr. De Gex* and *Mr. Gardiner* for some of the defendants, who affirmed that the testator's domicile was in Jersey.

Mr. Mackeson, *Mr. Crossley*, *Mr. Willcock*, and *Mr. Cates* for the other defendants, who affirmed that the testator had not lost his Scotch domicile.

JAMES, V.C., referring to the recent unreported case of *Udney* v. *Allarat*, in the House of Lords, said the law was clear. A man's domicile of origin was changed whenever there was a permanent residence of an unlimited character voluntarily assumed by him abroad. The facts in this case resembled those in *Hoskins* v. *Matthews*, 8 D. G. M. & G. 13, and he decided that the testator's domicile was in Jersey.

JAMES, V.C. July 25. } *Re* ST. JOHN'S TRUST.

Practice—Clerical Error.

Mr. Daniel Jones asked for leave to amend a petition, on the ground that the name of a respondent had been given by a clerical error as Charles Bird B. instead of Charles Edward B.

JAMES, V.C., said he would be described in the order as 'Charles Bird B., in the petition wrongly called Charles Edward B.', and that there was no need to amend the petition.

Probate and Matrimonial Causes.

Probate. July 6. } *In the goods of* D. JENKINS.

Testamentary Suit—Guardian ad litem—Next of Kin of Minor—Citation.

David Jenkins died on November 28, 1867, leaving a will, in which he appointed his wife sole executrix and guardian to his only child, a minor, eight years of age. The executrix proved the will on December 14, 1867.

Bayford, on behalf of John Jenkins, brother of the testator, moved the Court to appoint him guardian to the minor, for the purpose of calling in the probate and contesting the validity of the will. He referred to Sidney Smith's Chancery Practice, 7th ed. vol. i. pp. 271-273.

Lord PENZANCE:—It may be a proper application, but I cannot grant it behind the mother's back. You must first cite her to show cause why the uncle should not be appointed guardian *ad litem*.

Divorce and Matrimonial Causes. July 6, 20. } MUMBY *v.* MUMBY.

Matrimonial Suit—Petition for Alimony—No Answer—Respondent's Faculties Proved by Affidavit—Practice.

This was the wife's petition for alimony *pendente lite*. The husband filed no answer.

Dr. Swabey asked to be allowed to prove the respondent's income by affidavits. He carried on the business of a quack doctor at Kingston-on-Hull, and it would be very expensive to bring up witnesses to prove his faculties.

Lord PENZANCE:—I think, in order to save needless expense, I should grant the motion, but you must give notice to the respondent that you have filed affidavits in the Registry, where he can see them, and that you intend to ask the Court to allot alimony upon them.

Affidavits as to the respondent's income were filed in the Registry, and on July 20 alimony at the rate of 1*l.* per week was allotted to the petitioner.

Divorce and Matrimonial Causes. July 20. } MILFORD *v.* MILFORD.

Matrimonial Suit—Permanent Alimony—Maintenance and Custody of Children.

The wife obtained a decree of judicial separation on the ground of the husband's adultery on December 18, 1866, and the custody of the two children of the marriage—daughters, aged respectively ten and eight years—was given to her until further order. The matter now came before the Court on applications by her for permanent alimony, and an allowance for the maintenance and education of the children. The separate income of the petitioner was admitted to be 248*l.* per annum; that of the respondent, 550*l.* per annum. The father of the respondent, a banker at Exeter, and his daughter offered to take charge of the children, and to maintain and educate them in a manner suitable to their future position in life.

Dr. Spinks (with him *Dr. Tristram*) for the petitioner.

Dr. Deane (with him *Searle*), for the respondent, urged that the Court should consider the interests of the children, and commit them to the care of their grandfather and aunt. If the petitioner thought fit to keep them, she was not entitled to ask for an allowance for their maintenance.

Lord PENZANCE held that the petitioner, as the innocent party, was entitled to the custody of the children. He allotted permanent alimony (including the wife's separate income) at the rate of 260*l.* per annum, and ordered the respondent to contribute 30*l.* a year towards the maintenance and education of the children, both orders to go from the date of the decree.

High Court of Admiralty.

Admiralty. July 21. } THE CYRUS.

Wages—Objection to Registrar's Report—New Evidence.

There were two causes of wages against this vessel by separate masters; the vessel had been sold and the proceeds paid into Court. The suits were undefended by the owner, but a judgment creditor in respect of repairs had intervened, and thereupon the accounts of the masters were referred to the registrar, who reported that nothing was due to the plaintiffs. Petitions were then filed in objection to the report, which now came on for hearing.

Pritchard, for the plaintiffs, tendered witnesses in support of the objections.

Phillimore, for the defendant, objected. The witnesses might have been examined before the registrar, and therefore, unless some good reason were given, the Court ought not to allow their evidence to be taken.

Sir R. J. PHILLIMORE:—As the witnesses were accessible at the time of the hearing before the registrar, they could not now be called. The Court would therefore reject the petitions, but allow the matter to be again referred to the registrar upon the plaintiffs paying the costs already incurred and finding bail, each in 30*l.*, to answer further costs. In future, when objections are taken to the report of the registrar, and it is intended to call further evidence, averments to that effect must be introduced into the petition, with reasons why the witnesses could not be previously called.

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Courts of Equity.

LORD HATHERLEY, L.C. } OVEREND, GURNEY & Co.
July 14, 28. } (LIMITED) *v.* GURNEY.

Demurrer—Limited Company—Directors.

This was an appeal from an order of MALINS, V.C. (*ante*, p. 115) overruling a general demurrer to the bill put in on behalf of two of the defendants.

Sir R. Palmer, *Mr. Glasse*, and *Mr. H. M. Jackson* for the appellants.

Mr. Cotton and *Mr. Ferrers* for the bill.

The LORD CHANCELLOR could not agree with the decision of his Honour V.C. MALINS. The relief sought by the bill went to the recovery, first of the paid-up capital which had passed through the directors' hands, and secondly of the amount which the shareholders had had to pay on their shares since the company was in liquidation. With regard to the second claim, none of that money had ever come to the hands of the directors, and the company could not under any circumstances obtain repayment of it in this Court. With regard to the first, no doubt if the bill sufficiently alleged a breach of trust in the application of it, the defendants might be made liable to refund it by a suit in this Court. But the facts of the case as stated in the bill were, that the company was formed and the money subscribed for the very purpose of buying the business of the old firm of Overend & Gurney. That might be a great risk; but at least the company must be taken to have been aware of it. At any rate the company could not now, in the absence of fraud or personal misconduct on the part of their directors—neither of which were charged in the bill—seek to make them refund money which had been used by them for the very purposes for which the company was formed, and in a manner authorised by the memorandum and articles of association. The demurrer must be allowed, with costs, and the deposit be returned.

GIFFARD, L.J. } *Re* CHINA STEAMSHIP CO. (LIMITED).
July 26. } *Ex parte* DRUMMOND.

Companies Act, 1862, *s.* 23—*Contract to take Shares—Memorandum of Association.*

Mr. Drummond appealed from the decision of the MASTER OF THE ROLLS (reported *ante*, p. 6), holding that his name was rightly placed on the list of contributories.

The China Steamship Company was formed for the purchase of the business and assets of the Labuan Coal Company; the consideration being fully paid-up shares in the China Company. Mr. Drummond, who was a holder of shares in the Labuan Company, sub-

scribed the memorandum of association of the new company for twenty-five shares, and became a director. He afterwards applied for shares in the new company in respect of his shares in the old, and 479 fully paid-up shares were allotted to him. Upon the winding-up of the China Company Mr. Drummond's name was placed by the official liquidator on the list of contributories for the twenty-five shares for which he had subscribed the memorandum of association of the new company, and the MASTER OF THE ROLLS declined to remove it.

Mr. Jessel and *Mr. Speed* appeared for Mr. Drummond in support of the appeal.

Mr. Roxburgh and *Mr. Wickens* for the official liquidator.

GIFFARD, L.J., held that the obligation to take the twenty-five shares was satisfied by the allotment of the 479 shares, and Mr. Drummond's name must be removed from the list of contributories.

MALINS, V.C. July 26. } DICKINSON *v.* DILLWYN.

Settlement—Husband and Wife—Covenant to Settle after Acquired Property—Gift by Will of Husband to Wife—Property Acquired after the Coverture.

Special case. By their marriage settlement, dated August 23, 1828, Mr. and Mrs. Dillwyn entered into a joint and several covenant that they and all necessary parties would concur and join in conveying, assigning, settling, and assuring all property, whether real or personal, to or in which Mrs. Dillwyn or her husband in her right might thereafter become entitled or interested under the will or intestacy of or by gift from her father, or under the will or intestacy of or by gift from any other person or persons whomsoever, so as to vest the same in the trustees upon the trusts of the settlement.

Mr. Dillwyn, the husband, died in August 1843, having by his will given all his real and personal estate to his wife absolutely.

Mrs. Dillwyn also became entitled, upon the death of a sister in November 1849, to receive under the will of her father a sum of 100*l.*

Mr. C. Hall appeared for the surviving trustee of the settlement.

Mr. Cotton and *Mr. Fry*, for Mrs. Dillwyn, contended that the covenant only extended to property acquired during the coverture.

Mr. Murray Browne for the only surviving child of the marriage.

The VICE-CHANCELLOR said that although the covenant, literally construed, applied to the whole life of the wife, the intention of the parties never could have been that it should apply to the husband's own property. The questions were: whether the covenant applied—(1) to the property which Mrs. Dillwyn acquired under her husband's will; (2) to the 100*l.* which she became entitled to receive under her father's will. Therefore HIS HONOUR held—(1) that the wife was not bound to settle what she acquired under her husband's will; but (2) that she must bring into the settlement the 100*l.* derived under her father's will, as that came within the express terms of the covenant.

MALINS, V.C. July 31. } CARTER *v.* CARTER.

Marriage Settlement—Covenant by Wife to Settle After-acquired Property—Gift by Will of Husband to Wife—Property Acquired after the Coverture.

By a settlement made in 1849, on the marriage of Mr. and Mrs. Carter, a sum of 5,000*l.* was assigned to trustees upon certain trusts for the issue of the marriage; and in the same settlement was contained a joint and separate covenant by the intended husband and wife, 'that if she, her executors or administrators, or he, his executors or administrators, in her right, should at any time thereafter become absolutely entitled' to any real or personal property of the value of 200*l.* or more, they respectively, or their respective executors or administrators, would convey and assign the same upon the trusts of the settlement, 'or as near thereto as circumstances would admit of.'

Mr. Carter died in 1868, having by his will given to trustees, of whom his wife was one, all his real and personal estate in trust as his wife should appoint, and subject thereto upon certain trusts for herself and her children.

The real property left by Mr. Carter was of the value of about 5,000*l.* Mrs. Carter duly appointed the whole of it to herself, in ignorance of the effect of the above covenant. A bill was then filed by the trustees of the settlement to enforce the covenant, and for an injunction to restrain Mrs. Carter from dealing with the property which she took by her husband's will. Mrs. Carter demurred for want of equity. The motion for injunction and the demurrer now came on for hearing together.

Mr. C. Hall and *Mr. G. Williamson* for the demurrer.

Mr. Wickens and *Mr. Casson* for the bill and motion.

MALINS, V.C., said he should follow his own decision in *Dickinson* v. *Dillwyn* (see above), and hold that the property which came to Mrs. Carter under her husband's will was not affected by the covenant, on two grounds; first, because he considered that the words in the covenant 'at any time thereafter,' meant only 'at any time during coverture;' and, secondly, because of the extreme improbability that a gift to the wife from the husband himself by his will was meant to be included in such a covenant.

MALINS, V.C. July 27. } BULTHEL *v.* PLUMMER.

Will—Power of Appointment, not Exclusive—Execution Held Void as to Part only.

By a settlement made on the marriage of Mr. and Mrs. Plummer in 1809, certain real and personal property was settled upon the husband and wife for life, and on their decease it was to go among the children of the marriage and the issue of any then dead, as the husband and wife should jointly by deed, or the survivor should by will appoint, and in default of appointment among the individuals of the same class equally.

There were five children of the marriage; one attained twenty-one years, and died a bachelor in the lifetime of Mr. and Mrs. Plummer; another, George, also died in their lifetime, but left four children; three survived them, *i.e.* Henry Plummer, Frances Plummer, spinster, and Mrs. Westmacott. Mrs. Plummer survived her husband many years, and died in 1867, having by her

will, in pursuance of the aforesaid power, appointed out of the said trust property a certain house to Frances in fee, a sum of 2,500*l.* stock to Mrs. Westmacott, 500*l.* to Henry, and 100*l.* to Maria, one of her four grandchildren; and she then gave and appointed all the residue of her property to the said Frances Plummer. The specific appointments did not exhaust the fund.

This bill was filed to obtain the decision of the Court on the validity of the appointments; it was admitted on all sides that the power in the settlement of 1809 was was not a power of exclusive appointment, while in fact the effect was to exclude the three remaining children of the deceased son George.

Mr. Glasse and *Mr. Waugh* for the trustees of the settlement of 1809.

Mr. J. Pearson and *Mr. Langley*, for Frances Plummer, contended that even if the appointment of the residue were bad, the specific appointments remained good.

Mr. Cole and *Mr. Key*, for Mrs. Westmacott, supported the same view.

Mr. Cotton and *Mr. Bedwell*, for the children of the son George, contended that the execution of the power was bad *in toto*, and that the entire trust property went as in default of appointment.

MALINS, V.C., however, held that all the appointments contained in the will were good, with the exception of that of the residue of the trust fund, contained in the residuary gift to Frances Plummer, and therefore that such residue only was unappointed. That would have been the result if the specific appointments and the appointment of the residue had been made by separate instruments, and HIS HONOUR thought the same principle ought to apply when the appointments were all made by the same instrument.

MALINS, V.C. July 29. } HEASMAN *v.* PEARSE.

Apportionment Act (4 & 5 *Wm. IV. c.* 22)—*Tithe Rent-charge—Instrument Creating Life Interest before the Act—Lease Renewed and Tithes Commuted After.*

Adjourned summons, upon which the only question was as to the right of the applicant, Dr. Gratwicke, as the legal personal representative of his deceased wife, to an apportionment of a certain tithe rent-charge.

Mrs. Gratwicke was tenant for life under the will of a testator who died in 1821 (before the date of the Apportionment Act) possessed of certain tithes, which he held under a renewable lease for lives. The last renewal was made to the trustees of the will on November 10, 1834 (after the date of the Apportionment Act), and under the Tithe Commutation Act the tithes were commuted by an award of the Tithe Commissioners made on June 25, 1849, which was duly confirmed on September 3, 1851.

Mrs. Gratwicke died on September 26, 1867, five days before the tithe rent-charge, which was payable half-yearly, fell due.

Mr. C. Hall, in support of the summons, contended that the tithe rent-charge was apportionable.

Mr. G. Greene, for the residuary legatees, *contra*, insisted on the difference between a rent-service and a tithe rent-charge, and argued that the latter was not within the Apportionment Act.

The VICE-CHANCELLOR said that, but for the Tithe Commutation Act, this lady would have received in kind the entire tithes of corn and hay for the whole summer and autumn of 1869, and that Act only substituted a rent-charge for the tithes which she would otherwise have received. The Apportionment Act ought to receive a liberal construction, and therefore HIS HONOUR held that this tithe rent-charge was apportionable.

JAMES, V.C. July 30. } MARSHALL *v.* ROSS.

Injunction—Trade-Mark—Misrepresentation—Patent.

The plaintiffs were flax spinners and thread manufacturers, carrying on business at Leeds and Shrewsbury under the firm of 'Marshall & Co.,' and had for forty years past used for the wrappers of the first quality of thread manufactured by them an embossed stamp of an oval shape, containing, amongst other things, in the upper half of the margin the word 'Shrewsbury,' and in the lower half the words 'Patent Thread.' With respect to the latter they stated in their bill as follows:—'The word "patent" in the description "patent thread" is the name by which thread of the first quality is and for many years last past has been described and known in the trade; and the words "patent thread" are and for many years last past have been used by thread manufacturers and the trade as the name or designation of thread of the first quality. The word has no reference to any royal letters patent, or any exclusive privileges in respect of the thread, and is merely used as a term of distinction to distinguish the first quality from the second quality of thread.'

The infringement was not disputed, but

Mr. Davey, for one of the defendants, contended that the misrepresentation involved in the use of the term 'patent thread,' to describe an article which was not, and never had been, protected by a patent, disentitled the plaintiffs to relief in a Court of Equity.

Mr. Kay and *Mr. Marten* were for the plaintiffs.

JAMES, V.C., said that he was very glad to be able to grant what justice required without interfering with the decisions which had been cited. The word 'patent' was certainly sometimes understood as having nothing to do with letters patent, *e. g.* in 'patent leather boots'; and here it was a material circumstance that it had been used in such a sense for many years by manufacturers and the trade generally.

Injunction granted.

JAMES, V.C. July 30. } *In re* PATENT FLOOR CLOTH COMPANY (LIMITED).

Voluntary Winding-up—Insufficient Notice—Petition for Compulsory Winding-up Reheard.

In February 1869 a petition was presented by certain creditors for a compulsory winding-up of the company; but inasmuch as it appeared that a resolution had previously, viz. on January 6, 1868, been passed for a voluntary winding-up, it was ordered that the latter should be continued under supervision. The liquidator having contracted to sell certain property of the company under such winding-up, the purchaser objected to the title on the ground that the resolution for a voluntary winding-up was void for want of sufficient notice,

With a view of removing this difficulty a motion was now made, with consent of all parties, that the original petition for a compulsory winding-up might be re-heard.

Mr. Lawson for the motion.

Mr. Giffard for the liquidator of the company under the voluntary winding-up.

Mr. Davey (*am. cur.*) mentioned a recent case (not reported), in which such an order had been made without any fresh advertisements being required.

James, V.C., said he should follow that precedent, and ordered the petition to be in the paper on Saturday. On Saturday His Honour said the registrar had been unable to find the order mentioned by Mr. Davey, but saw no objection to making the order, all parties entitled to be served having been served again.

James, V.C. } *Re* Oxford and Canterbury Hall
July 31. } Company (Limited).

Winding-up—Creditor Realising Security—Purchase-Money Remaining Unpaid—Rescission of Contract.

Adjourned summons.

Prior to the winding-up of the above company, the London and County Bank advanced to the company 11,000*l.*, for which the company executed a mortgage of their premises in Oxford Street and Lambeth, the deed being dated July 3, 1867, and containing the usual power of sale. On January 9, 1869, about six months after the commencement of the winding-up, but before their claim had been sent in to the official liquidator, the mortgagees contracted with a Mr. Syers for the sale to him of the mortgaged property for 8,500*l.* (besides the fixtures, which were subsequently valued at 758*l.*). The purchaser being unable to complete his contract, on June 29, 1869, after their claim had been sent in, they signed a new contract, whereby it was agreed that the old contract should be considered as cancelled, and the premises and fixtures should be purchased by a Mr. Taylor and a son of the former purchaser for 9,025*l.*; the deposit already paid to be considered as paid on account of the new contract, and the balance of the purchase-money to be paid on April 1, 1870. Under these circumstances the liquidator contended that the bank, having realised their security before sending in their claim, could only be allowed to prove in the winding-up for the balance of their debt, after deducting the amount of the purchase-money specified in the first contract.

Mr. Kay and *Mr. Waller* for the bank.

Mr. Eddis and *Mr. Higgins* for the official liquidator.

James, V.C., said that the case was not governed by *Kellock's case*, the creditors having elected to realise their security before sending in their claim, and that the claimants could only prove for what was due to them after deducting the net proceeds of sale. Costs of all parties out of the estate.

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In re CORK AND YOUGHAL RAILWAY CO. *Ex parte* OVEREND, GURNEY & CO., AND *Ex parte* LONDON AND HAMBURGH BANK.

Lloyd's Bonds—Validity of, in Equity.

This was an appeal from a decision of MALINS, V.C. (reported *antè*, p. 143). The question in the case was as to the validity in equity of certain Lloyd's bonds which the railway company, having exhausted their borrowing powers, had, in 1862, given to their financial agent, David Leopold Lewis, for him to raise money upon. The issue of these bonds was sanctioned by the shareholders of the company; and Lewis raised money on them, and paid some of the creditors of the company. Subsequently the Cork and Youghal Railway was wound up under an Act of Parliament. Claims were carried in under the winding-up against the assets of the company by Overend, Gurney & Co. as assignees, and by the London and Hamburgh Bank as mortgagees of some of the bonds given to Lewis. The Vice-Chancellor allowed the claims, and the railway company appealed.

Mr. Jessel and *Mr. Higgins* for the appellants.

Mr. Roxburgh and *Mr. Lindley* for Overend, Gurney & Co.

Mr. Cotton and *Mr. Graham Hastings* for the London and Hamburgh Bank.

Mr. J. Pearson, Mr. Waller, and *Mr. Jackson* for other parties.

The LORD CHANCELLOR said that it certainly was not law, as had been contended, that, when a company had exhausted their limited powers of borrowing, no contractor or creditor who subsequently trusted the company could be allowed to recover. On the other hand, any loan-notes or debentures given by a company beyond their powers were void in equity no less than at law. But in this case, as to some of these advances, it had been proved that they were actually applied in payment of debts incurred by the company, and others were advanced for the payment of specific debts; and the whole series of transactions was effected with the consent and sanction of the shareholders. They knew that the money was to be raised, and they certainly could not now take the surplus assets which were in fact created by this money, without paying the debts. The order made, however, must be varied, as it was not proved that all the money advanced was applied in payment of debts. There must be an inquiry on that point, and the bonds must be held good so far as they represented money applied in payment of debts recoverable against the company.

GIFFARD, L.J., concurred.

LORD HATHERLEY, L.C. and GIFFARD, L.J., Nov. 4. } LAING *v.* REED.

Benefit Building Society—Certified Rules—Legality of.

The question in this case involved the legality of one of the rules of the Northern Counties Permanent Benefit Building Society, which had been certified by Mr. Tidd Pratt, the barrister appointed for that purpose.

The rule in question authorised the trustees of the society for the time being to borrow money at interest not exceeding 5*l.* per cent., to procure which they should give their personal security, being indemnified out of the first funds of the society which should be received, subject to a proviso limiting the total sum of money to be borrowed to two-thirds of the amount for the time being secured by mortgages to the society. The object of the bill was to have it declared that this rule was not authorised by the Act of Parliament 6 & 7 Wm. IV. c. 32, under which the society was constituted, and that such borrowing was a breach of trust, and beyond the powers of the trustees of the defendants, and that the payment of interest on the money borrowed was a misappropriation of the funds of the society. The question was raised upon demurrer, and MALINS, V.C., being of opinion that the case could be more conveniently decided at the hearing, overruled the demurrer, but upon appeal,

Their LORDSHIPS thought that the questions of law were fairly raised by the bill, and were proper to be decided upon demurrer. They agreed that the certificate of the barrister could not make the rule valid if it contravened the Act of Parliament, but it was admitted that there was no express prohibition in the Act, and, on the other hand, it might be very convenient and beneficial to the society to be able to borrow money for an advance at a time when all their funds might be invested. They therefore allowed the demurrer.

Sir Roundell Palmer and *Mr. J. W. Chitty* were for the demurring defendants; and

Mr. Glasse and *Mr. Graham Hastings* for the bill.

GIFFARD, L.J., Nov. 3. } *Re* THE NATAL INVESTMENT COMPANY (LIMITED). SNELL'S CASE.

Company—Surrender of Shares—Subscriber of Memorandum of Association—Companies Act 1862, *s.* 23.

The question on this appeal was whether Mr. Snell was a contributory in respect of twenty shares. He had signed the memorandum of association for twenty shares, and had also made the usual application for them and paid the deposit. After this, and before any shares had been registered in his name, he discovered that the character of the company was different from what he had supposed, and he thereupon requested that his application for shares should be cancelled and his deposit returned. This was done, and his name was never entered on the register of members of the company. By the articles of association the directors had express power to accept surrenders of shares.

The MASTER OF THE ROLLS thought that under section 23 Mr. Snell was bound to become a shareholder, and that what had been done had not the effect of releasing him. Mr. Snell appealed.

Sir R. Baggallay and *Mr. Marten* for the appellant.

Mr. Jessel and *Mr. Kelly* for the respondent, the liquidator.

GIFFARD, L.J., thought that Mr. Snell's position in the first instance was equivalent to that of a shareholder, but that the subsequent transactions had severed his connection with the company, so that he ceased to be a shareholder. He reversed the decision of the MASTER OF THE ROLLS.

LORD ROMILLY, M.R. Nov. 8. } TONGE *v.* WARD.

Injunction—Trademark—Imitation of Trader's Name by a Word Similar in Sound—Foreign Market—Costs.

This was a suit for an injunction to restrain defendants from affixing to cloth sold by them tickets having thereon a word similar in sound to the plaintiffs' name, for an account, and an inquiry as to damages.

The plaintiffs were manufacturers of cloths at Manchester chiefly for export to, and sale in, America. The defendants were commission agents at Manchester. For several years it had been customary for the plaintiffs, or the commission houses buying from them, to affix to the plaintiffs' cloths tickets or labels, having thereon the plaintiffs' name, and thereby the plaintiffs' cloths obtained a reputation in America as 'Tonge's' cloths. In 1868 a Mr. Brown, of the firm of White and Brown, of New York, gave the defendants, on behalf of his firm, an order for cloths of a similar make but inferior quality to the plaintiffs' cloths, and at the same time he directed the defendants' manager to affix thereto tickets having thereon the word 'Tungs.' The defendants' manager carried out this order without the personal knowledge of the defendants, and sent out to America between 5,000 and 6,000 pieces of cloth with such tickets affixed thereto. There was evidence to show that the plaintiffs were injured by this fraud, both as regarded the sale of their cloth, and also as regarded their reputation as manufacturers in the American market. Upon discovery of the fraud the plaintiffs at once applied by letter to the defendants for an undertaking against the repetition of it, and the payment of 50*l.* to the Manchester Infirmary. The defendants offered to give such an undertaking and pay

50*l.* to the infirmary, but they refused to make such payment through the plaintiffs or with any acknowledgment of the fraud as the plaintiffs required in their negotiations with the defendants subsequent to their said letter. Thereupon the plaintiffs filed this bill for an account, an injunction, and damages.

Sir Richard Baggallay, *Mr. Jessel*, and *Mr. Thurstan Holland* for the plaintiffs.

Mr. Swanston and *Mr. Hume Williams*, for the defendants, argued that the defendants' manager had affixed the tickets as Browne's agent. The defendants were willing to comply with the requirements made by the plaintiffs' letter, and the bill should not have been filed.

The MASTER OF THE ROLLS said the plaintiffs were clearly entitled to the decree they asked. The using of another manufacturer's name was a stronger thing than the infringement of a trademark, and this was plainly an imitation of plaintiffs' name by defendants' servant, for which defendants were responsible. The defendants, upon the bill being filed, might have at once offered the plaintiffs all they were entitled to ask, with costs up to that time, but they had not done so, and the decree must be for an injunction with an inquiry as to damages (the account asked for having been waived), and with costs to the hearing.

STUART, V.C. Nov. 5. } GERRARD *v.* DAWES. *In re* THE ESTATE OF MATTHEW DAWES. DRYDEN *v.* DAWES.

Solicitor and Client—Fund Recovered in Suit—Solicitor's Bill of Costs—Cheque of Accountant-General—Interim Order to Restrain Delivery of Same to the Client— 23 *&* 24 *Vict. c.* 127, *s.* 28.

The above suits were instituted by the creditors for the administration of the estate of a Mr. Matthew Dawes. In 1862 John Whittle, a creditor of the estate, obtained (through the assistance of his solicitor) allowance of a claim in the matter and causes amounting (with interest) to the sum of 62*l.* 3*s.* 7*d.* The taxed costs in reference to that claim were 25*l.* 16*s.* 6*d.*, making a total of 88*l.* 0*s.* 1*d.* In 1864 John Whittle was paid the sum of 29*l.* 10*s.* 1*d.* as the first dividend on his claim. His solicitor soon afterwards sent in his bill of costs in respect of the establishment of the claim and other matters, amounting to 64*l.* 4*s.* 7*d.* On March 6, 1866, John Whittle paid his solicitor 5*l.* on account of his bill, and gave him a six months' promissory note for the balance, viz. 59*l.* 4*s.* 7*d.* That note was not duly paid, and a writ was issued for the money. The writ, however, was not served, because it was not known where John Whittle was residing. On February 29, 1869, a final decree was made in the suits for the distribution of the residue of the testator's estate. A cheque was drawn by the Accountant-General under the decree for the sum of 43*l.* 14*s.* 5*d.* in favour of John Whittle, and the further payment of his dividend on the testator's estate. That cheque, however, John Whittle had not yet received; in fact, it was still in the hands of the Accountant-General.

Mr. E. S. Ford, on behalf of the solicitor of John Whittle, who had only been paid the above-mentioned 5*l.* on account of his bill of costs, moved, *ex parte*, for an order to restrain the Accountant-General from delivering up the cheque to John Whittle (if he should call for it) until a petition could be presented under the 23 & 24 Vict. c. 127 (An Act to amend the Laws relating to Attorneys, Solicitors, Proctors, and certificated Conveyancers) s. 28. By that section it is enacted that—'In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding shall have been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor for the taxed costs, charges, and expenses of, or in reference to, such suit, matter, or proceeding,' &c., &c.

STUART, V.C., made an interim order as asked by the motion, on the undertaking of the solicitor to abide by any order the Court might make as to damages (if any) sustained by John Whittle in consequence thereof.

MALINS, V.C. Nov. 2, 3. } BRADBURY *v.* BENTON.

Trademark, Infringement of—Title of Publication—'Punch'—'Punch and Judy.'

This was a motion on behalf of the proprietors and publishers of *Punch* to restrain the defendant from publishing and selling a weekly periodical called *Punch and Judy*, on the ground that the title and general appearance of the last named publication (its size and shape being the same, and the design of the outer sheet or frontispiece being of the same character and in some respects similar to that of *Punch*) was an infringement of the plaintiff's well-known and long-established trademark or copyright, and being calculated to deceive and mislead the public, would thereby injure the sale of the plaintiff's periodical.

It was also alleged that there being another well-known periodical called *Judy* the public would erroneously be led to suppose that there had been an amalgamation between that and the plaintiff's periodical. Only three numbers of *Punch and Judy* had been issued at the date of the motion, and there was no evidence as to the fact of any purchaser having been deceived. The price and day of publication were different from that of *Punch*.

Mr. Jessel, *Mr. C. Hall*, and *Mr. Lindley* appeared in support of the motion.

Mr. Glasse and *Mr. Langley* for the defendant.

MALINS, V.C., thought the case scarcely fell within the authorities, and, being disinclined to extend this jurisdiction of the Court, refused the motion. The conduct of the defendant, however, in adopting such a title was open to suspicion; and his HONOUR would make no order as to costs.

MALINS, V.C. Nov. 8. } POUPARD *v.* FARDELL.

*Practice—Close of Evidence—Evidence after time closed—Surprise—*15 *&* 16 *Vict. c.* 86, *ss.* 38, 39.

Mr. Glasse (*Mr. Bovill* with him) applied for special leave to examine certain witnesses orally under the following circumstances. The bill was filed by a patentee to restrain the infringement of his patent. An answer

had been put in and replication filed. On the last day for taking evidence the defendant filed an affidavit, saying that the alleged invention had been in prior use in certain places (not being the prior user alleged in the bill), as he could bring witnesses to show. The plaintiff alleged that the evidence took him by surprise, and he now asked, notwithstanding the time had closed, for special leave to call witnesses to be examined at the hearing, to rebut the above statements. He referred to Dan. Ch. Pr. 823; 15 & 16 Vict. c. 86, s. 38 (see Morgan A. & O. 187).

Mr. Mackeson (*Mr. Cooper* with him) opposed. The application should have been under section 39 of the recited Act, which gives the Court the power at the hearing, but not otherwise. But even under section 38 the special leave of the Court was required, *i. e.* upon special circumstances shown. But there was here nothing special; plaintiff had deliberately elected to proceed by replication, and thus enabled the defendant to conceal his case till the last moment, and must abide by the consequence of his election.

MALINS, V.C., thought the Act gave him discretion on the subject, and possibly justice could not be done without the evidence of these witnesses; he should therefore give the plaintiff leave to bring them, that they might, if necessary, be examined orally under the powers given to the Court by section 39 of the Act, which he should exercise if needful.

MALINS, V.C. } *Re* THE OIL AND TALLOW REFINING
Nov. 8. } CO. (LIMITED).

Company—Winding-up—Service of Petition.

Mr. N. Higgins applied for leave to serve the petition in this matter upon the persons who executed the memorandum of association of the company, or any of them. The offices of the company were closed, and the secretary had gone away.

The COURT gave the leave required.

JAMES, V.C. } WILSON *v.* THE FURNESS RAILWAY
Nov. 3. } COMPANY.

Specific Performance—Agreement to Make a Road by a Railway Company—Ultra vires—Laches—Demurrer.

Demurrer. The bill stated the incorporation of the Ulverstone and Lancaster Railway Company, with power to take lands for the purposes of their railway, and, subject to such waiver of the Admiralty as therein mentioned, to carry a viaduct over the Kent estuary in Morecambe Bay, and construct a swing bridge. By an Act passed in 1858, the Furness Railway Company were empowered to purchase the works of the Ulverstone Railway, but subject to all liabilities of the said Ulverstone Railway. By an agreement, made in June 1862, between the plaintiffs and the Ulverstone Railway Company, it was agreed that, if the Admiralty would waive their right to require the said swing bridge, and if a conveyance should be made to the company of certain land required for making the road therein mentioned, the company would within a specified time make the road therein mentioned, and would make and maintain a wharf as therein mentioned. The Admiralty duly waived the right to require the swing bridge, and the conveyance of the land was duly made to the Ulverstone Railway Company prior to August 1863, when the defendant company took a conveyance upon a sale to them of the Ulverstone Railway Company's undertaking and property. The defendant company had begun, but failed to complete the road and wharf, though required by the plaintiffs so to do. The plaintiffs prayed for the specific performance of the above agreement.

Mr. Fry and *Mr. Currey* supported the demurrer, on the ground that (1) the construction of such works was *ultra vires* of the company; (2) the plaintiffs' remedy was at law; (3) the Court could not enforce an agreement to do works like these, which it could not superintend; (4) the plaintiffs had forfeited their right to relief by laches.

Mr. Kay and *Mr. Nalder* appeared in support of the bill.

JAMES, V.C.—Rather than allow the company to retain possession of the land, and refuse to execute the works, the Court would struggle in every way to make them perform their agreement, even, if necessary, by allowing the plaintiffs themselves to execute the works at the company's expense. The agreement by which the railway obtained a release from certain obligations in consideration of giving something else more convenient to both parties was not *ultra vires*. The length of time for which the company had held the land without performing their part of the agreement could not be advanced by them as a reason for refusing now to complete it, and the demurrer must be overruled with costs.

JAMES, V.C. } TWYNAM *v.* PORTER.
Nov. 9. }

Practice—Revivor and Supplement—Death of a Defendant—Statute 15 *&* 16 *Vict. c.* 86, *s.* 52.

The plaintiff in this suit, her brother, Edward Twynam, and her sister, Emily Porter, were entitled, as tenants in common, to certain real and leasehold estates. The bill was filed by the plaintiff against the defendant G. T. Porter (the husband of Emily Porter) for an account of moneys received by him on her behalf, including the rents and profits of the said estates which the defendant G. T. Porter had received for a number of years as trustee for the plaintiff. The said Edward Twynam and Emily Porter were also made defendants in the suit in respect of their joint interests with the plaintiff in the said estates. The defendant Emily Porter, after having duly appeared to the bill, died in August 1869, without leaving any legal personal representative. It appeared that her share of the real estate was in settlement, and her interest in the suit only extended to her being present at the taking of the accounts, the bill not praying for a partition.

Mr. Thurstan Holland now moved *ex parte*, on behalf of the plaintiff, for an order of revivor, that the suit might be carried on without any representative of the deceased defendant, or against her husband, the defendant G. T. Porter, as representing her interest.

JAMES, V.C., doubted at first whether he had jurisdiction to make such an order upon an *ex parte* application, but he ultimately made an order that the proceedings might be carried on notwithstanding the absence of any personal representative of the defendant Emily Porter, deceased.

JAMES, V.C. } *Re* THE UNITED PORTS AND GENERAL
Nov. 6. } INSURANCE COMPANY.

Winding-up—Priority of Petitions—Advertisement.

There were three petitions for winding up this company. The first, presented by a person lately in the employ of the company, who was a creditor in respect of his salary, asked that a voluntary winding-up, which had been voted for at a preliminary meeting but not confirmed, might be continued under supervision. The other petitions asked for a compulsory winding-up, the second in order of presentation being third in order of advertisement.

Mr. Eddis and *Mr. F. C. J. Millar* were for the first petition.

Mr. Horton Smith for the second.

Mr. Amphlett and *Mr. Brooksbank* for the third in order of presentation.

Mr. E. K. Karslake and *Mr. Cracknall* for the company.

Mr. Robinson, *Mr. Jackson*, and *Mr. Kekewich* for other parties.

JAMES, V.C., said that there must be a compulsory winding-up, the proposed voluntary winding-up being part of an arrangement with another company which the Court could not sanction, and that he should make the order on Mr. Amphlett's petition, on the ground that the advertisement, which was equivalent to service of the petition on the world in general, ought to give priority.

Courts of Common Law.

Queen's Bench. } *Re* THE BEVERLEY COMMISSIONERS,
Nov. 3. } *Ex parte* FITZGERALD.

Bribery Commissioners—Jurisdiction—Meeting Adjourned by Two instead of Three Commissioners—15 & 16 *Vict. c.* 57, *ss.* 1, 4.

By 15 & 16 Vict. c. 57, 'An Act to provide for more effectual Inquiry into the Existence of Corrupt Practices at Elections for Members to serve in Parliament,' s. 1, it is enacted that upon an address of both Houses of Parliament Her Majesty may appoint Commissioners to make inquiry into corrupt practices at elections. . . . And in case any of the Commissioners so appointed die, resign, or become incapable to act, it shall be lawful for the surviving or continuing Commissioners or Commissioner to act in such inquiry as if they or he had been solely appointed to be Commissioners or a sole Commissioner for the purposes of such inquiry, and (as to such sole Commissioner) as if this Act had authorised the appointment of a sole Commissioner; and all the provisions of this Act concerning the Commissioners appointed to make any such inquiry shall be taken to apply to such surviving or continuing Commissioner or Commissioners.

By section 4 the Commissioners appointed under the Act to make inquiry as aforesaid in relation to any county, division of a county, city, borough, university, or place, shall upon their appointment, or within a reasonable time afterwards, go to such county, division of a county, city, borough, university, or place, and shall from time to time hold meetings for the purposes of such inquiry at some convenient place within the same, or within ten miles thereof, and shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, division of a county, city, borough, university, or place, or within ten miles thereof, as to them may seem expedient; and such Commissioners shall give notice of their appointment, and of the time and place of holding their first meeting, by publishing the same in some newspaper in general circulation in such county, division of a county, city, borough, university, or place, or the neighbourhood thereof. Provided always that such Commissioners shall not adjourn the inquiry for any period exceeding one week without the consent and approbation of one of Her Majesty's principal Secretaries of State.

Three Commissioners were appointed under this Act to inquire into the existence of corrupt practices in the borough of Bridgwater. All three Commissioners held a meeting on September 25, 1869, and adjourned to the 27th, when only two of them attended, and, in the absence of the third, took evidence, and adjourned till October 19. The Secretary of State had previously given his consent to an adjournment till this day in answer to an application from the secretary of the Commissioners on their behalf. It appeared also from an affidavit of one of the Commissioners, that the adjournment on the 27th was in point of fact with the consent of all three Commissioners. The three Commissioners sat on the 19th, and adjourned till the 21st, when they again met and committed one Fitzgerald to custody for contempt in refusing to give evidence. Upon application to HAYES, J., at chambers, a writ of *habeas corpus* was granted, returnable in this Court.

Sir J. Karslake (*Sleigh, Serj.* and *M. Howard* with him) now moved that the prisoner be discharged, and contended that the adjournment by the two Commissioners on the 27th was an illegal act, so that from that time the Commission ceased to have any legal existence, and the meeting on the 19th was invalid.

The *Attorney-General* (*Sir R. Collier*) and *Archibald* in support of the return, contended that the power to adjourn in section 4 could not cut down the power of holding meetings from time to time which the section had previously given to the Commissioners.

The COURT (COCKBURN, C.J., MELLOR, J., LUSH, J., and HANNEN, J.) held that the return was good, and that the application to discharge the prisoner must be refused. Without deciding whether a smaller number than two of the Commissioners could exercise the powers conferred by the Commission, it was quite clear that section 4 conferred a power to hold meetings from time to time, irrespective of the regulation as to adjournments. Therefore, assuming that the proceedings on the 27th were without jurisdiction, it was competent for the three Commissioners to hold meetings on a subsequent day. The argument in favour of the prisoner assumed that the proceedings before the Commissioners must be governed by the law and regulations applicable to Courts of Quarter Sessions and Coroners' Courts, which are required to sit on a fixed day, and where a formal adjournment is necessary to enable them to sit *de die in diem*. As for the express power of adjournment in section 4, it was intended only to enable the Commissioners to adjourn from place to place, and perhaps to show that they were not bound to sit from day to day.

Judgment accordingly.

[An application in this case was made to the Court of Exchequer on November 11, 1869, and a rule *nisi* granted.]

Queen's Bench. (*Magistrate's Case.*) Nov. 7. } HALL (APPELLANT) *v.* POTTER (RESPONDENT).

Public Health Act, 1848, *s.* 69—*Costs of Sewering, Paving, &c.—Streets not being Highways—Mistake in Plan.*

Case stated by the stipendiary magistrate for the Manchester division of the county of Lancaster, under the 20 & 21 Vict. c. 43.

On August 7, 1867, the respondent was served with a notice by the Local Board of Health for the district of Rusholme, under section 69 of the Public Health Act, 1848, requiring him, as owner of certain premises fronting and abutting on Victoria Street in the said district, not being a highway repairable by the inhabitants at large, within the space of two calendar months, to sewer, level, pave, flag, and channel so much of the said street as the said premises abutted upon in manner therein mentioned, and in accordance with a plan and section deposited at the office of the said local board.

The respondent not having executed the works in pursuance of the notice, the same were performed by the local board, and the sum of 94*l.* 11*s.* 7*d.* apportioned as the respondent's share of the expenses, which he refused to pay.

Upon the hearing of a summons to show cause why an order should not be made upon him for payment of the above amount, the respondent contended that the notice was insufficient, inasmuch as by the accompanying plan it appeared that certain strips of land in front of the premises, being private property and not dedicated to the public, were required to be paved, flagged, &c., and that the notice, of which the plan formed part, being therefore bad in part, was altogether informal and void. The magistrate being of that opinion, dismissed the summons.

W. R. Cole for the appellant.

Quain (*Baylis* with him) for the respondent.

The COURT (COCKBURN, C.J., LUSH, J., HANNEN, J., and HAYES, J.), were of opinion that the circumstance of a small portion of land being indicated on the plan, to which the notice could not lawfully have reference, did not, therefore, render the notice void, inasmuch as the repondent must have been perfectly aware of what was legally required, and that to that extent the notice was good.

Judgment for the appellant.

Queen's Bench. Nov. 8. } RICHARDSON *v.* DU BOIS.

Lunatic—Authority of Lunatic's Wife to Pledge his Credit—Wife Receiving a Sufficient Allowance.

This was an action by the plaintiff, a builder and decorator, to recover 51*l.* 5*s.* 10*d.*, as the balance due to him for painting, papering, &c., a house in Thurloe Square, between February and August 1867. The defendant, who was an attorney and proctor, had occupied the house under a lease since the year 1860 till October 1865, when he became of unsound mind, and was placed in an asylum. His wife, however, continued to reside in the house with her three children, and employed the plaintiff to execute the repairs in question. The plaintiff did not know of the husband's insanity until a fortnight after he had commenced his work. At the trial before HANNEN, J., in July 1868, at Guildhall, it was proved in defence to the action that the wife in the space of two years and four months, including the period during which the work was done, had received from her husband's estate a sum exceeding 2,200*l.* The jury, in answer to questions from the learned judge, found that the wife, at the time when the work was done, was in receipt of a sufficient allowance for herself and her children, that the house wanted repairs, and that the charges were reasonable. A verdict was entered for the defendant, and a rule obtained to enter it for the plaintiff for the amount claimed.

Keane and *J. Robins* now showed cause; and

O'Brien, Serjeant, and *Beasley* supported the rule.

The COURT (COCKBURN, C.J., MELLOR, J., LUSH, J., and HANNEN, J.) gave judgment for the defendant. It was clear that the wife had a sufficient allowance, and she had therefore no authority to pledge her husband's credit. There was no reason why the husband's estate should be saddled with an indefinite liability because the tradesman had not chosen to make inquiries.

Rule discharged.

Queen's Bench. Nov. 8. } DIGNAM *v.* BAILEY.

Practice—Issues of Fact and Issues of Law—Party entitled to Judgment.

In this case the declaration was against the defendant as sheriff for an escape. The pleas were—first, not guilty; secondly, that the debtor was discharged from custody on the production of the certificate of the registration of a composition deed under the Bankruptcy Act, 1861. Replication, first, a joinder of issue; secondly, that the plaintiff's cause of action first arose after the registration of the deed, and that he was not among the creditors referred to or intended to be bound by the deed.

Rejoinder, taking issue on the replication.

The plaintiff also demurred to the second plea, and the defendant to the second replication, but it was held by the Court that the plea was bad and the replication

good (see *Dignam* v. *Bailey*, 37 Law J. Rep. (N.S.) Q. B. 71). Upon the trial of the issues, it appeared that the plaintiff's cause of action against the debtor was in respect of a bill of exchange accepted by the debtor, and which was outstanding at the date of the deed, though the debtor had neglected to plead the deed, and the Court, upon a rule obtained for the purpose, directed the verdict to be entered for the defendant, upon the ground that the only question raised on the pleadings was whether the plaintiff was a creditor bound by the deed (see *Dignam* v. *Bailey*, 38 Law J. Rep. (N.S.) Q. B. 219. A summons was afterwards taken out at Chambers to show cause why the verdict should not be entered for the plaintiff on the plea of not guilty, and MELLOR, J. made an order that the verdict should be entered for the plaintiff on the plea of not guilty; but, as the defendant had succeeded on the issue raised by the replication to the second plea, that the *postea* should be delivered to the defendant. A rule to amend this order having been obtained,

Raymond showed cause.

J. O. Griffits, in support of the rule, contended that the replication could not alter the effect of the judgment on the demurrer to the second plea, and that the Court must look at the plea by itself, so that the plaintiff would be entitled to the *postea* as having succeeded on both pleas.

The COURT (COCKBURN, C.J., MELLOR, J., LUSH, J., and HANNEN, J.) were clearly of opinion that the order was right, as upon the whole record the defendant was entitled to judgment.

Rule discharged.

Common Pleas. Nov. 3. } ABREY *v.* THEODORE CRUX.

Evidence—Oral Contemporaneous Agreement Limiting Operation of Written Agreement—Bill of Exchange.

Action by payee against drawer of a bill of exchange. Plea, that the bill was drawn by the defendant for the accommodation of one A. C. and as surety for him, and that at the time of the drawing and delivery of the bill to the plaintiff it was agreed between the plaintiff, the defendant, and A. C., that the latter should deposit with the plaintiff certain securities, consisting of a lease and dock warrants for goods, and that, in case the bill was not paid the plaintiff should sell such securities and apply the proceeds in payment of the bill, and that until so sold the defendant should not be liable on the bill. Averment that the plaintiff did not sell such securities, but that he still holds the same.

At the trial before KEATING, J., at the Middlesex sittings in Trinity Term last, the question was whether the defendant should be allowed to give oral evidence only in support of this plea. The learned judge having refused to admit such evidence, a verdict was entered for the plaintiff. A rule *nisi* was afterwards granted for a new trial.

Channell showed cause.

Henry James in support of the rule.

The COURT (WILLES, J., *dubitante*) held that the learned judge rightly refused to receive the oral evidence, as the effect of it was to alter the defendant's liability as it appeared on the face of the bill.

Rule discharged.

Common Pleas. Nov. 5. } MORRIS *v.* BETHELL.

Bill of Exchange—Forged Acceptance—Estoppel from Denying Acceptance.

Action against the defendant as acceptor of a bill of exchange, dated July 20, 1868, for 400*l.*, and payable three months after date. Plea denying the acceptance. At the trial, before BOVILL, C.J., at the Middlesex sittings after last Trinity Term, the plaintiff proved that he had discounted the bill for the drawer, and that on May 2, 1867, he had discounted for the same drawer a similar bill for 300*l.*, which in like manner purported to be accepted by the defendant, and appeared to be accepted in the same handwriting as the bill sued on, and that that bill for 300*l.* was paid at maturity at the bankers where it was made payable, out of money provided for that purpose by the defendant. The defendant, however, proved that both acceptances were forgeries. The jury found that the acceptance sued on was not the defendant's, that it was not written by his authority nor adopted by him, and further that the defendant did not know that the plaintiff was the holder of the bill for 300*l.* when he caused it to be paid.

Huddleston (*Holl* with him) now moved for a rule to enter the verdict for the plaintiff, on the leave reserved, if on the facts proved consistently with the finding of the jury the Chief Justice ought as a matter of law to have directed a verdict for the plaintiff.

The COURT refused a rule, being of opinion that, even if the defendant had by paying the forged acceptance for 300*l.* made some evidence against himself that the acceptance sued on was with his authority, the defendant was not estopped from proving that in fact he had not authorised the acceptance.

Rule refused.

Common Pleas. Nov. 4. } BROOKS *v.* BLAIN.

Malicious Prosecution—Onus Probandi.

This was an action for malicious prosecution. At the trial it appeared that after the dismissal of the plaintiff from the defendant's service one of the defendant's travellers called on a customer, P., who claimed to have paid 20*l.* to the plaintiff for the defendant, and P. produced a receipt; that the defendant wrote to P., who reaffirmed his statement and sent the receipt; that the defendant then consulted his attorney, and afterwards charged the plaintiff with embezzling the 20*l.* It was made clear at the trial that the plaintiff was not guilty, but it appeared that there were some other matters which would themselves have constituted reasonable and probable cause, though it did not appear whether the defendant knew them at the time of the charge. A verdict was found for the plaintiff, with leave to the defendant to move to enter a nonsuit, and a rule *nisi* granted.

Digby Seymour and *Lawrence* showed cause.

O'Brien and *Cave* supported the rule.

The COURT made the rule absolute for a nonsuit, one learned judge thinking that plaintiff's case alone showed reasonable and probable cause, the other two that assuming knowledge necessary, it lay on the plaintiff to show the absence of reasonable and probable cause, and therefore to show that the defendant had not such knowledge of the other matters.

Rule absolute.

Probate and Matrimonial Causes.

Divorce and Matrimonial Causes. Nov. 8. } CONSTABLE *v.* CONSTABLE.

Wife's Petition for Alimony—No Answer—Husband's Faculties—Right of to Cross-Examine Witnesses—Practice.

The wife petitioned for alimony *pendente lite*. The husband filed no answer. The petitioner was called, and deposed to the respondent's income as set forth in her petition.

Bosanquet, for the respondent, desired to cross-examine her.

Holl, for the petitioner, objected.

The COURT held that inasmuch as the respondent had filed no answer, he was not entitled to cross-examine any witnesses called in support of the petition, and allotted alimony *pendente lite*.

High Court of Admiralty.

Admiralty Court. Nov. 3, 9. } THE YOUNG JAMES.

Damages—Liability of Statute less than 300l.—County Court—Costs.

This was a cause of damage in which the defendants, the owners of the Young James, had paid into Court 252*l.*, the amount of their statutory liability at 8*l.* per ton. The plaintiffs had accepted this tender, reserving the question of costs, and now moved the Court to decree the money to be paid out to them, with costs, and to give them a certificate under section 9 of the County Court Admiralty Jurisdiction Act, 1868, if one was necessary to entitle them to costs. The action was originally commenced in the sum of 1,000*l.*; it was admitted that the plaintiffs' actual loss exceeded 300*l.*, which is the limit of the jurisdiction of the County Court. The section referred to enacts that—'If any person shall take any proceedings in the Court of Admiralty which he might have taken in a County Court, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court is limited, he shall not be entitled to costs, unless the judge of the Court of Admiralty, or of a Superior Court before whom the cause is tried or heard, certifies it was proper to be tried in the Court of Admiralty or Superior Court.'

E. C. Clarkson for the plaintiffs. The plaintiffs' claim exceeded the amount over which the County Court had jurisdiction. The Young James was arrested for the full amount of the damage, and it was not until the defendants had shown their right to a limited liability, and the value of their ship, that the amount was reduced to a sum recoverable in a County Court.

E. G. Gibson.—The true construction of the section is to make the sum recovered the test to determine whether proceedings might have been taken in a County Court, and this has always been held to be the rule in construing similar enactments. Otherwise a plaintiff would only have to exaggerate his claim to oust the jurisdiction of the inferior Court. Plaintiffs' legal claim has never exceeded the sum to which they now admit they are alone entitled; and as the judge had not heard the case, or tried it, he had no power to grant a certificate, and the circumstances did not entitle the plaintiffs to have one.

Nov. 9.—Judgment for plaintiffs, with costs.

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LORD HATHERLEY, L.C. } PARKES *v.* STEVENS.
Nov. 2, 12.

Issues of Fact—Patent—Specification—Infringement.

In this case, reported *antè*, p. 165, JAMES, V.C., had tried five issues of fact before himself without a jury, and had decided the first four issues in favour of the plaintiff, and the fifth in favour of the defendant; from these decisions both the plaintiff and defendant appealed, by way of original motion, for a new trial.

Mr. Webster, *Mr. Kay*, and *Mr. Everitt* appeared for the plaintiff on the first appeal, and

Mr. Amphlett and *Mr. Bagshawe* for the defendant on the second.

The LORD CHANCELLOR dismissed both appeal-motions, but without costs.

GIFFARD, L.J. } *In re* THE JOINT STOCK DISCOUNT CO.
Nov. 12. } *Ex parte* THE WARRANT FINANCE CO

Winding-up—Proof against Two Estates—Interest Subsequent to Proof.

The decision of the MASTER OF THE ROLLS in this case is reported in 38 Law J. Rep. (N.S.) Chanc. 565, and a short note of it will be found *antè*, p. 208.

The Warrant Finance Company were holders of bills of exchange to the amount of 13,000*l.* accepted by the Contract Corporation and endorsed by the Joint Stock Discount Company. Both of these companies were in liquidation, and the Warrant Finance Company having proved for the amount of the bills against both estates, had received from the Joint Stock Discount Company dividends to the extent of 15*s.* 6*d.* in the pound, and

from the Contract Corporation dividends to the extent of 4*s.* 6*d.* in the pound. The Warrant Finance Company having thus been paid in full except as to interest subsequent to the date of the winding-up order, the MASTER OF THE ROLLS, on the application of the official liquidator of the Joint Stock Discount Company, ordered that they should be excluded from further dividends until all the debts proved against the Joint Stock Discount Company should have been paid in full. His LORDSHIP considered that the case was governed by the decision of the LORDS JUSTICES in the case of *The Humber Iron Works Company*, antè, p. 151.

The Warrant Finance Company appealed.

Sir Richard Baggallay, *Mr. Eddis*, and *Mr. Langley* appeared for the appellants.

Mr. Jessel and *Mr. Locock Webb* for the respondents.

GIFFARD, L.J., was of opinion that the case was not governed by the decision referred to. In principle it was the same as *Kellock's case*, L. R. 8 Chanc. 769, in which it was held that a creditor holding security was entitled to prove, under a winding-up, for the whole amount due to him, and not merely, as in bankruptcy, for the balance remaining due after realising his security. The order of the MASTER OF THE ROLLS must, therefore, be discharged.

LORD ROMILLY, M.R. Nov. 11. } *In re* NEW ZEALAND BANK CORPORATION.

Companies Act, 1862—*Jurisdiction to Stay Proceedings at Law.*

Two of the shareholders in this company had brought several actions for damages against the directors, on the ground of their alleged misconduct in the affairs of the company.

Mr. Jessel and *Mr. H. M. Jackson* now moved that an inquiry might be directed into the conduct of the directors, and that the proceedings at law might be stayed. They urged that the inquiry would be more conveniently conducted in this Court.

Sir Richard Baggallay (*Mr. H. M. Jackson* with him), on behalf of all the shareholders except the plaintiffs at law, supported the motion.

Mr. Roxburgh, for the plaintiffs at law, opposed the motion, on the ground that the Court had no jurisdiction to stop the action.

Mr. Williams appeared for the official liquidator.

The MASTER OF THE ROLLS held that he had no jurisdiction to stay the actions, and refused the motion, but, under the special circumstances of the case, without costs.

LORD ROMILLY, M.R. Nov. 13. } BERRIE *v.* HOWITT.

Solicitor's Lien—23 & 24 *Vict. c.* 127, *s.* 28.

This was a suit to administer real estate. The MASTER OF THE ROLLS had decided that the shares of the parties interested must bear the costs of such parties, the suit being in the nature of a partition suit.

One of the parties interested was entitled to certain shares of the properties as tenant in tail; he had died without barring the estates tail.

His solicitor now petitioned that a lien might be declared on the inheritance of his client's shares.

Mr. Jolliffe in support of the petition.

Mr. Ware, *Mr. Method*, and *Mr. Rendall* contra.

The MASTER OF THE ROLLS decided that the solicitor was only entitled to a lien on the life interest of his client.

LORD ROMILLY, M.R. Nov. 13. } *Re* SPENCE'S CEMENT CO.

Companies Act, 1862—*Winding-up.*

This was a petition by paid-up shareholders that the company might be wound up on the ground, among others, that it was unable to pay its debts. The petition was supported by a creditor who had been unable to obtain payment of his debt and was suing the company.

Mr. Roxburgh and *Mr. Cave* for the petitioner.

Mr. N. Higgins, for the creditor, in support.

Mr. Baggallay and *Mr. H. Smith* for the company.

The MASTER OF THE ROLLS said, that though the creditor seemed to have made out a case which would have entitled him to an order on a petition of his own, he would make no order on the present petition.

LORD ROMILLY, M.R. Nov. 13. } *Re* BOLTON'S WILL.

Trustee Relief Act—Payment out of Court—Service on Trustees.

This was a petition for the payment out of Court of funds to persons becoming entitled absolutely on the death of a tenant for life.

The place given by the trustees for service in their affidavit had been pulled down—the trustees had not been heard of for ten years.

Mr. Pitcairn asked that service on them might be dispensed with.

The MASTER OF THE ROLLS said he would dispense with service, but the matter must be referred to Chambers to inquire who were the persons entitled.

STUART, V.C. Nov. 9. } POWELL *v.* ROBERTS.

County Court Equitable Jurisdiction Act (28 & 29 *Vict. c.* 99)—*Jurisdiction—Redemption Suit—Right to Redeem Resisted.*

The principal question upon this appeal from a decision of the judge of the County Court of Denbigh was whether, under the County Court Equitable Jurisdiction Act, 28 & 29 Vict. c. 99, a County Court had jurisdiction to entertain a redemption suit in which it was sought to set aside a sale of the mortgaged hereditaments by the first mortgagee.

The facts, so far as material to this point, were as follows:—Henry Jones mortgaged two allotments, Nos. 17 and 19 in the map of the parish of Llanfair, in the county of Denbigh, first to Gabriel Roberts, and afterwards to John Powell; and he subsequently mortgaged an allotment, No. 18, therein to Gabriel Roberts. The mortgage to Roberts of Nos. 17 and 19 contained a power of sale in default of payment after six months' notice, and that of No. 18 a similar power after three months' notice. On March 1, 1866, Roberts gave the mortgagor notice

to pay off the moneys due on both mortgages. On the 3rd of the same month, the mortgagor executed a conveyance and assignment of his real and personal estate for the benefit of his creditors. Powell offered to redeem Nos. 17 and 19, which were comprised in the second mortgage to him, but in August 1866, and before the expiration of his notice, Roberts sold by private contract the three allotments comprised in both his mortgages to J. C. Jones for a lump sum, and conveyed the property to the purchaser, who took with notice of Powell's claim to redeem. Powell then filed his plaint in equity in the County Court of Denbigh against Roberts, the purchaser, and the trustees of the creditor's deed, for a declaration that the sale by Roberts was invalid as to the allotments Nos. 17 and 19, and that it might be set aside and a proper conveyance be executed by the purchaser, and for an order for redemption and foreclosure of the said allotments, upon the footing that the plaintiff was second mortgagee thereof. The defendant Roberts denied that any proper offer to redeem had ever been made, and, amongst other things, disputed the jurisdiction of the County Court.

His Honour Mr. Vaughan Williams, the judge of the Denbigh County Court, made a decree in favour of the plaintiff, and from that decree the defendant Roberts now appealed.

Mr. Freeling and *Mr. A. E. Miller*, for the appellant: The Act of 28 & 29 Vict. c. 99 gives to the County Courts equitable jurisdiction, amongst other things, in suits for redemption (sect. 1, c. 3) and in suits for the cancelling of agreements for the sale of property (sect. 1, c. 4); but this is not a common redemption suit, for the right to redeem is disputed; nor is it a suit to cancel an agreement, for its object is to set aside a deed.

Mr. Dickinson and *Mr. Langworthy* for the respondent.

STUART, V.C., said that the Act gave the County Courts jurisdiction in all suits for redemption, and that a redemption suit in which the right to redeem is resisted was still a suit for redemption. His HONOUR considered cancelling the deed was not a necessary part of the relief, but that the Legislature, in giving the County Courts jurisdiction in redemption suits, had given them power to decide questions incident to the right to redeem, and dismissed the appeal with costs.

JAMES, V.C. } THE WHEELER AND WILSON MANUFACTURING CO. *v.* SHAKESPEAR.
Nov. 9. }

Injunction — Trademark — Name of Inventors Used as Name of Machine — 'Agent for a Machine' — Fraudulent Misrepresentation — Costs.

The plaintiffs were an American company, formed for the purpose of manufacturing sewing machines according to a patent which had since expired, Wheeler and Wilson being the names of the original patentees. The defendant, who carried on business at Birmingham, received a letter from the secretary of the company, appointing him their agent for the sale of these machines upon certain terms therein stated. He signified his acceptance of some, but not all of those terms, and proceeded to issue advertisements in which he represented his place of business as a branch establishment opened by the Wheeler and Wilson Company, and himself as 'the only authorised agent for Wheeler and Wilson's sewing machines.' He also inscribed the name 'Wheeler and Wilson' on his door-post. Subsequently the company withdrew the authority given to him to act as their agent, but he nevertheless continued to advertise himself as 'agent for Wheeler and Wilson's sewing machines, and to sell such machines as before. In one of his advertisements he had continued to use the word 'authorised,' but dropped that on a remonstrance by the plaintiffs. The plaintiffs now sought to restrain him from advertising or selling any machines under the name of 'Wheeler and Wilson's sewing machines,' and from holding himself out as an agent for the sale of such machines.

Mr. Kay and *Mr. Speed* for the plaintiffs.

Mr. Bristowe and *Mr. Beale*, for the defendants, were stopped as to the right to use the name 'Wheeler and Wilson,' and on the other point contended that a person calling himself 'agent for' such an article was understood in common mercantile language to mean that he dealt in such articles on agency terms, as in the case of newspaper agents, house agents, &c., and not to imply that he was authorised to act for any particular principal.

JAMES, V.C., held, on the first branch of the case, that when an article of a particular make had become generally known under the name of the inventor, any manufacturer of such article had a right to call it by that name. To hold otherwise would be in effect to continue a patent after its expiration. But on the second point he considered that the defendant had in fact endeavoured to make it appear that he was an agent for the sale of the machines in the same sense after the plaintiffs had ceased to employ him as their agent as he was before, and had thereby perpetrated a gross fraud, to the injury of the plaintiffs. There must therefore be an injunction as prayed, except as to the use of the words 'Wheeler and Wilson'; and the defendant, notwithstanding his having been partially successful, must pay the costs of the suit.

JAMES, V.C. } POWELL *v.* ELLIOT.
July 9, 12. } ELLIOT *v.* POWELL.
Nov. 4, 5, 8, 9. }

Specific Performance — Misrepresentation — Rescission of Contract — Delay.

The first of the above suits was for specific performance of a contract to purchase certain collieries in South Wales and Monmouthshire for 430,000*l*. The second was a cross suit on the part of the purchasers, seeking a rescission of the contract, on the ground that the vendors had largely misrepresented the value of the property. The purchasers were a company formed in 1864, under the name of the Lower Duffryn Steam Coal Company (Limited), for the purpose of taking over the collieries which the defendant Elliot had previously agreed to purchase. The price was fixed on the strength of a valuation made by Elliot, assisted by two other engineers, Forster and Armstrong; and it appeared that this valuation was based mainly on the monthly cost-sheets which had been kept by the vendors for several years previously, showing the amount of coal raised and the stores consumed. The contract was executed under the seal of the company in July 1864, and 70,000*l*. paid as a first instalment of the purchase-money, whereupon the purchasers were let into possession, and

had been working for two years, when the vendors, in August 1866, filed their bill for specific performance. The purchasers, by their first answer, to some extent, and more distinctly by their answer to the amended bill, raised the question of misrepresentation, putting it as a reason for an abatement of price, but afterwards, in July 1867, filed a cross bill to set aside the contract altogether, alleging that they had since discovered errors in the aforesaid valuation, chiefly as to the cost of working and transport, which would make a total difference of nearly 100,000*l.* (In the course of the dispute further payments had been made by the purchasers 'without prejudice,' and the balance of purchase-money was paid into Court.)

Sir R. Palmer, Mr. Osborne, Mr. Wickens, and *Mr. Giffard* for the vendors.

Mr. Jessel, Mr. Kay, Mr. C. Hall, and *Mr. Bidder,* for the purchasers, contended that they were entitled either to rescind the contract or to perform with an abatement, expressing a preference for the latter alternative.

Sir R. Palmer in reply.

JAMES, V.C., said he had always understood the plain rule of equity to be, that if A., dealing with B., makes a false statement respecting the subject matter of the contract, as to which he represents himself, or must be taken, to know the real facts, that contract cannot stand, unless the person to whom the statement is made has precluded himself by his conduct from the relief to which he would otherwise have been entitled. In this case the vendors had represented in 1863, not as a matter of estimate but as an actual fact, that with a certain expenditure they raised and put on board ship in that year a certain quantity of coal of a certain value, a statement the truth of which was of the highest importance to the purchasers. After hearing everything that could be said on the other side, his Honour had no doubt that that statement was incorrect to the extent of many thousands of pounds. The excuse was that Elliot (and he would assume for the sake of argument that all the purchasers were on the same footing) knew the statement to be based on the cost-sheets, and ought, therefore, to have tested them; and that the fact of their having been incorrectly kept absolved the vendors from the charge not only of deceit but of mistake. On the contrary, those cost-sheets presented an appearance of minute accuracy which was eminently calculated to put the purchasers off their guard and prevent them from inquiring further, whereas in fact there had been hardly an attempt to keep them correctly. The various suggestions offered to account for the discrepancies were idle, and he was bound to find, as a jury, that there had been substantial misrepresentation. Nor were the purchasers precluded from relief on the ground of delay, having been at arm's length since the end of 1864, and having made substantially the same case by their answers to the vendors' bill as by their cross bill. As to the nature of the relief to be given, he considered himself precluded from decreeing compensation by the way in which the case was put in the pleadings, and it would lead them into a vast field of expense, without any data on which to direct an account to be taken. There would therefore be a decree for rescission of the contract *ab initio*, for payment out of Court of the moneys paid in, and repayment of the purchase-money already paid, with interest at 5 per cent., for an account of the coal worked out by the purchasers, the value of which would be set off against the sums payable to them in respect of costs, purchase-money, and interest.

JAMES, V.C. Nov. 11. | THE LONDON AND NORTH WESTERN RAILWAY CO. *v.* GARNETT.

Injunction—Restrictive Covenant—Beerhouse.

This was a motion for an injunction. In March 1860 the plaintiff company sold to the defendant a plot of land at Wolverton, where the plaintiff company had a large establishment and railway carriage factory, and by the indenture of conveyance the defendant covenanted that the land and the buildings to be erected thereon should not be used 'as a beerhouse, inn, or public-house for the sale of spirituous liquors, and that none of certain specified trades, or any other trade or business of any description should be carried on which might be a nuisance to the plaintiffs, their successors or assigns.' A house was erected upon the land, and in September 1864 the defendant obtained a license under statute 31 & 32 Vict. c. 27 for the sale of beer not to be drunk on the premises, and he soon afterwards commenced the sale of beer by retail accordingly. The plaintiffs thereupon filed their bill to restrain the defendant from selling beer in this manner upon the premises on the ground that he was thereby acting in breach of his covenant.

Mr. Speed and *Mr. Ince* appeared in support of the motion.

Mr. Bateman for the defendant.

JAMES, V.C., said it was conceded that the word 'beerhouse' did not mean every place where beer was sold, but there must be some limitation put upon such definition. In the last edition of Burns' 'Justice of the Peace,' before 1860, being the edition of 1845, a beerhouse was defined as 'a house in which beer, &c., is sold by retail to be drunk or consumed on the premises.' A person wishing to ascertain the meaning of the word in 1860 would probably have resorted to that work. He thought that as things went the plaintiffs were not entitled to an interlocutory injunction, and he must refuse the motion. Costs to be costs in the cause.

JAMES, V.C. Nov. 10, 12. | THE LEATHER CLOTH COMPANY (LIMITED) *v.* LORSONT.

Injunction—Covenant in Restraint of Trade—Unlimited Restriction—Public Policy.

This was a suit for an injunction to restrain the defendant from carrying on the business of 'manufacturer of Crockett's American leather cloth,' in breach of an agreement entered into by him.

The plaintiff company were formed in 1857 for the purpose of purchasing certain patent processes for the manufacture of American leather cloth, then vested in the defendant and others as representing 'The Crockett International Leather Cloth Company,' and by an agreement, dated May 21, 1857, the company contracted to purchase the said patent processes and the business of the Crockett Company for 20,000*l.* By the same agreement, the defendant with others agreed 'that they, or any of them, would not directly or indirectly carry on, nor would they to the best of their power allow to be carried on in Europe any company or manufactory hav-

ing for its object the manufacture or sale of productions in any way similar to the productions' of the plaintiff company 'so as to interfere with the exclusive enjoyment of the said intended (plaintiff) company of the benefits thereby agreed to be purchased.'. The defendant acted as managing director of the plaintiff company from 1857 to 1863. In 1868 the defendant commenced the business in England of a 'manufacturer of Crockett's leather cloth,' and sold goods which, according to his own advertisements, were similar to those of the plaintiffs' manufacture. The plaintiffs thereupon filed this bill.

Sir R. Palmer, *Mr. Kay*, and *Mr. A. G. Marten* appeared in support of the bill.

Mr. Eddis, *Mr. Fisher*, and *Mr. Cohen*, for the defendant, contended that the agreement entered into by the defendant, being one in restraint of trade without any limitation as to time or space, was too large, and would not be enforced by the Court on the ground of public policy.

JAMES, V.C., said the cases established that all covenants in restraint of trade were bad, unless they were natural and reasonable for the protection of the parties in dealing with the subject-matter of them. Public policy required that when a man had invented a secret or process, he should be able to sell it in the most advantageous manner; and when his advantage required him to enter into any restrictions, he might do so, provided they were not unreasonable. This case resembled the sale of a secret where an unlimited restriction would be allowed rather than an ordinary covenant in restraint of trade. A man was entitled to restrain himself from communicating a secret, and thereby to obtain a higher price for it. Therefore here, independently of the words of qualification, 'so as not to interfere with the plaintiffs' business,' there was nothing in violation of the principles of public policy. The restriction was not a merely capricious one, and the plaintiffs were entitled to an injunction.

JAMES, V.C. Nov. 18. } BEACH *v.* SLEDDON.

Security for Costs—Next Friend of Married Woman—'Poor Circumstances'—Costs of Adjourned Summons.

Adjourned summons on behalf of a defendant that the next friend of the plaintiff, a married woman, might be ordered to give security for costs. The defendant, residing at Liverpool, made an affidavit that 'he was personally unacquainted with A. B. (the next friend, who described himself in the bill as "of No. 216 High Holborn, agent"), but that he had always understood that the said A. B. was a person in poor circumstances, and that A. B. had not, to his (the defendant's) knowledge or belief, any visible property or effects which would be a security for or available to meet any costs which he might be ordered to pay in the suit.' The next friend, after the adjournment from Chambers, made an affidavit that 'after payment of all his just debts he was well and truly worth 120*l.* (that being the largest sum ever required to be deposited as security for costs).

Mr. Yate Lee for the defendant.

Mr. Fry and *Mr. Joyce*, for the plaintiff, pointed out that the defendant had carefully avoided pledging his belief to the insolvency of the next friend, or to his inability to answer the costs.

JAMES, V.C., dismissed the summons, and, notwithstanding the objection that the next friend's affidavit was not filed until after the adjournment, with costs; and he added, that he saw no reason why the costs given on such occasions should not include the summons itself, as well as the adjournment.

Courts of Common Law.

Queen's Bench. Nov. 13. } KENT (APPELLANT) *v.* ASTLEY (RESPONDENT.)

Slate Quarry—Factory—Factory Acts Extension Act, 1867 (30 & 31 *Vict. c.* 103), *s.* 3, *sub-section* 7.

Case stated by justices under 20 & 21 Vict. c. 43.

A complaint was preferred by the appellant, Sub-Inspector of Factories, against the respondent, the proprietor of a slate and flag quarry, under the Factory Acts, as the occupier of a factory, for unlawfully employing, keeping, and allowing to remain in the said factory a young person requiring a surgical certificate of age, without such certificate, as required by the said Acts. There was also a second complaint for unlawfully employing, &c. the same young person without having duly registered his name and the date of his first employment or re-employment in the form and according to the directions given in Schedule B. to the Act 7 Vict. c. 15.

The slate quarry in question is a large open space extending over about 400 acres, in which are erected covered sheds or huts in which the works are carried on. Several hundreds of men and boys are employed in the preparation of the raw material, which is got in large blocks from the quarry, and conveyed to the sheds, where it is fashioned by hammers, chisels, and other instruments into slates for building purposes, tombstones, chimney-pieces, &c.

The justices dismissed the complaint, being of opinion that a slate quarry was not within the Factory Acts Extension Act 1867 (30 & 31 Vict. c. 103), sect. 3, sub-section 7, which brings within the operation of the Factory Acts 'any premises, whether adjoining or separate, in the same occupation, situate in the same city, town, parish, or place, and constituting one trade establishment in, on, or within the precincts of which fifty or more persons are employed in any manufacturing process,' the question for this Court being whether or no

the quarry and premises above described were within the operation of the Factory Acts.

The *Solicitor-General* (*Sir J. D. Coleridge*) (*Archibald* with him) for the appellant.

Milward (*Hawes* with him) for the respondent.

The COURT (COCKBURN, C.J., MELLOR, J., and HANNEN, J.) were of opinion that the above-described slate quarry could not be said to be 'premises' within the said section and sub-section, and therefore that the justices were right in dismissing the complaint.

Judgment for the respondent.

Queen's Bench. Nov. 15. } OAKE AND ANOTHER *v.* MORECROFT.

Practice—Judgment in Default of Appearance—Appearance in Person not handed in by the Defendant.

Rule for the plaintiffs to show cause why the judgment signed in this case should not be set aside, on the ground that it was signed after appearance entered. The affidavit of one Perry, described as lately a solicitor's clerk, in support of the rule, stated that the writ in the action, which was upon a bill of exchange and left at the defendant's house on October 24, was handed to him by the defendant, and that he prepared an affidavit, upon which the defendant obtained leave to appeal. On November 3 the plaintiffs obtained the usual order to proceed within three days, as if personal service had been effected, and Perry entered an appearance in person by the defendant on the morning of Monday, the 8th, the time for appearance having expired on the Saturday previous. The plaintiffs signed judgment on the same Monday morning, and on application to LUSH, J., at Chambers, for an order to set aside the judgment, it appeared doubtful on the evidence whether the appearance was entered before judgment or not. The learned judge refused, however, to set aside the judgment, on the ground that the appearance in person ought to have been handed in by the defendant himself. The rule above mentioned having been obtained,

Day showed cause.

Lumley Smith supported the rule.

The COURT (COCKBURN, C.J., BLACKBURN, J., HANNEN, J., and HAYES, J.) made the rule absolute, without costs, and upon the terms that no action should be brought by the defendant. If it were true that the agent in handing in the appearance was acting as an attorney without being duly qualified, this act might be made the ground of proceedings against him. But there was no reason for supposing that the Legislature intended that every defendant appearing in person should be compelled, however inconvenient it might be, to hand in the appearance *in propria persona*.

Rule absolute.

Common Pleas. Nov. 10. } *Re* JANE MENKENNETH.

Acknowledgment of Married Woman—Examination—Interested Commissioner.

A married woman acknowledged a deed under 4 Wm. IV. c. 74, before two commissioners, but, one being solicitor in the matter, she was previously examined before the other only, who had since died. The officer of the Court had refused to file the certificate on the affidavit of the surviving commissioner.

Willoughby applied for leave to file.

The COURT held that under the statute it was imperative that the examination should be before both commissioners, even though one was interested, and notwithstanding the rule of Court, and that the acknowledgment could not be filed; and intimated their disapproval of an interested person being a commissioner, unless there was some necessity in the particular case.

Common Pleas. Nov. 11. } AMES *v.* WATERLOW AND ANOTHER.

Sheriff, Liability of—Arrest of Person having Certificate of Protection—Bankruptcy Act, 1861, *s.* 198.

This was an action against the Sheriff of Middlesex for keeping the plaintiff in custody under a writ of *exigi facias*, after he had produced to the sheriff's officer a certificate of the registration of a deed of arrangement under the Bankruptcy Act, 1861. In *Ames* v. *Colnaghi*, 37 Law J. Rep. C.P. 159, which was an action by the same plaintiff against the judgment creditor at whose suit the plaintiff had been arrested upon the above writ of *exigi facias*, the Court decided that the effect of the said certificate was to entitle the plaintiff to be discharged from custody, although the sheriff had notice before the arrest that the deed of arrangement which had been registered was an invalid one. The plaintiff then brought the present action against the sheriff for keeping the plaintiff in custody after the production of such certificate, and the question, which came before the Court on demurrer to the pleadings, was whether the action would lie.

Robinson, Serjeant (*Tapping* with him), argued for the plaintiff.

Quain appeared for the defendants, but was not heard.

The COURT held that all that had been decided in *Ames* v. *Colnaghi* was that the plaintiff was entitled to be discharged from custody, and that the mode in which he was to be discharged was not raised in that case or decided; that the effect of section 198 of the Bankruptcy Act, 1861, enacting that the writ of execution should not be available to any creditor without leave of the Court, was only to suspend such writ; and that, as the certificate was to be available as a protection in bankruptcy, so in like manner as in the case of the arrest of a bankrupt no action would lie against the sheriff.

Judgment for defendants.

Common Pleas. Nov. 15. } HOOPER *v.* MARSHALL.

Composition Deed—Remedy against Sureties.

The declaration was on a bill payable to the plaintiff and accepted by the defendant; the plea set out a composition deed between the defendant and his creditors which reserved rights against sureties. The replication averred that the bill was payable to plaintiff or order; that before the making, &c. of the deed he had indorsed it away; that afterwards the bill was dishonoured; that he had not executed the deed, and had to pay the indorser; and that the bill was then returned to him. To the replication there was a demurrer.

Barnard, for the defendant, contended—first, that the replication was a departure, as the declaration said nothing about the bill being payable to order; and, secondly, that the deed was an answer to the action.

Raymond, for the plaintiff, contended—first, that there

was no departure; secondly, that the clause reserving rights against sureties allowed the action to be brought.

The COURT held there was no departure, but that the deed was an answer to the action, as according to *Wood v. De Mattos*, 35 Law J. Rep. (N.S.) Exch. 64, the plaintiff was a creditor within the deed.

Common Pleas. Nov. 15. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY (APPELLANTS) *v.* MYERS (RESPONDENT).

Railway Company—Overcharge.

This was an appeal from the decision of a County Court judge, and the short question into which the case resolved itself was as follows:—The respondent had sent certain goods to the appellants, to be carried by them from Southampton to Luton. The transit was over the appellants' and then over other railways. The appellants carried the goods over their line past the Clapham Junction to their goods station at Nine Elms, then back again to Clapham Junction, and so on, and charged the respondent a mileage rate for the distance between Clapham Junction and the Nine Elms and back again. The respondent paid the sum demanded, and then brought an action in the County Court for overcharge. The judge found that the carriage to and back from the Clapham Junction was reasonable and in the usual course, but found for the respondent, and stated a case.

Denman (*Mangles* with him) for the appellants.

Bere for the respondent.

The COURT held that the appellants were entitled so to charge.

Common Pleas. Nov. 17. BREWER *v.* BRADFORD.

Parliament—Borough Vote—Joint Occupation—30 & 31 Vict. c. 102, s. 3.

The appellant was sole tenant of a house in a parliamentary borough, and paid the rates; but he let to a person a bed-room and the partial use of a sitting-room for taking his meals. The revising barrister disallowed the claim to vote, on the ground that there was a joint occupation within the proviso to section 3 of 30 & 31 Vict. c. 102.

H. James for the appellant.

Francis for the respondent.

The COURT held that there was no such joint occupation by the lodger, and the appellant qualified.

Decision reversed.

Common Pleas. Nov. 17. SMITH *v.* LANCASTER.

Parliament—Borough Vote—Occupation of Chambers—2 Wm. IV. c. 45, s. 27.

The appellant, a barrister, was tenant of chambers in the Temple containing three rooms; he let two of them respectively to two other barristers, he to provide the laundress and coals, and he retained the other room. The revising barrister disallowed his claim to vote under 2 Wm. IV. c. 45, s. 27, on the ground that he occupied only part of a house in consequence of his so letting his two rooms.

Prentice for the appellant.

White for the respondent.

The COURT held that he was an occupier within the section, and qualified to vote.

Decision reversed.

Exchequer. Nov. 10, 15. GEORGE AND EMMA HIS WIFE *v.* SKIVINGTON.

Sale of Article Compounded by Vendor—Tort arising out of Contract—Warranty—Negligence—Husband and Wife.

The declaration stated that the defendant carried on the business of a chemist, and in the course of such business professed to sell a chemical compound made of ingredients known only to the defendant, and which he professed and represented to be fit and proper to be used for washing the hair, which could and might be so used without personal injury to the person using the same, and to have been carefully and skilfully and properly compounded; and thereupon the plaintiff George, being the husband of the plaintiff Emma, bought of the defendant, and the defendant then sold to him at and for a certain price then paid to the defendant, a bottle of the said compound to be used by the plaintiff Emma for washing her hair, as the defendant then well knew, and on the terms that the same was then fit and proper to be used, and could be safely used by her for the purpose aforesaid without personal injury to her, and had been skilfully, carefully, and properly compounded by the defendant; yet the defendant had so unskilfully, negligently, and improperly conducted himself in and about the making and selling the said compound, that by and through the mere unskilfulness, carelessness, negligence, wrongful and improper conduct of the defendant in that behalf, the compound was not fit to be used, &c. *Per quod* the plaintiff Emma, by using the same, was injured in health, and her hair was destroyed, &c.

Demurrer and joinder.

Lord, for the defendant, contended that the declaration showed no breach of any duty towards the wife; that it showed no knowledge, on the defendant's part, of the deleterious nature of the compound; and that the contract stated was one on which the husband alone could sue.

J. P. Ingham, for the plaintiff, was not called upon to argue.

The COURT (KELLY, C.B., CHANNELL, B., PIGOTT, B., and CLEASBY, B.) held that the action was maintainable, as there was a duty on the defendant's part towards the person for whom he knew the compound was purchased, and damage had resulted to her directly from the breach of that duty.

Judgment for the plaintiffs.

Court of Criminal Appeal.

Coram KELLY, C.B., MARTIN, B., BLACKBURN, J., LUSH, J., and BRETT, J.

Crown Case Reserved. Nov. 18. } REGINA *v.* MARTIN.

Coinage Offence—Procedure at Trial—24 & 25 Vict. c. 99, ss. 10, 12, 37.

The prisoner was indicted at the last Leeds summer assizes on the charge of being feloniously and unlawfully in possession of counterfeit coin, he having been before convicted of unlawfully uttering counterfeit coin. The possession of counterfeit coin with intent to utter the same is made a misdemeanour by the 24 & 25 Vict. c. 99, s. 11. By section 9 of the same Act it is a misdemeanour to utter counterfeit coin, knowing the same to be counterfeit. By section 12 of the same Act it is made a felony to commit any of the misdemeanours mentioned in sections 9, 10, or 11, after having been convicted of any of the said offences.

By section 37 of the same Act the proceedings upon any indictment for committing any offence after a previous conviction shall be as follows (that is to say) the offender shall in the first instance be arraigned upon so much only as charges the subsequent offence, and the jury shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty he shall then, and not before, be asked whether he has been previously convicted, &c.

At the trial it was proposed by the counsel for the prosecution to begin by proving the previous conviction, in order to show that the subsequent offence was a felony and not a misdemeanour. This course was objected to, and the objection held good by the Court. The case on the subsequent offence only was then gone into and left to the jury, who found the prisoner guilty. The prisoner was then asked whether he had been previously convicted as charged in the indictment, which he admitted.

Forbes appeared for the prosecution.

Held that section 37 regulated the proceedings at the trial, which were therefore in order.

Conviction affirmed.

Crown Case Reserved. Nov. 18. } REGINA *v.* RITSON AND RITSON.

Forgery—The Ante-dating by a Person of his own Deed —24 & 25 Vict. c. 98, s. 20.

Case reserved by HAYES, J.

William Ritson, and Samuel Ritson his son, were indicted at the last Manchester assizes, for forging a deed with intent to defraud James Gardner, under 24 & 25 Vict. c. 98, s. 20.

On May 7, 1868, the prisoner William Ritson was party to a deed by which he conveyed to Gardner in fee (who was at that time equitable mortgagee) certain freehold land then belonging to William Ritson. On April 20, 1869, Samuel Ritson put forward a claim to the land in question, under a deed executed by his father, William Ritson, and purporting to be dated March 12, 1868, that is to say, before William Ritson's conveyance to Gardner. This deed purported to demise to Samuel Ritson the most valuable part of the land afterwards conveyed to Gardner. At the conclusion of the evidence in the case, the jury were directed that if the alleged lease to Samuel was executed after the conveyance to Gardner, and ante-dated with the purpose of defrauding him, it would be a forgery. The jury found both prisoners guilty.

Torr appeared for the prisoners.

Addison for the prosecution.

Held, that the conviction was right.

Conviction affirmed.

Probate and Matrimonial Causes.

Nov. 6, 16. *Probate.* } BECKETT *v.* HOWE AND OTHERS.

Will—Signature—Acknowledgment.

Henry John Long died leaving a holograph will. A few days before its execution he told one of the attesting witnesses that he was about to make his will, and asked him if he would sign it. Subsequently he asked the second attesting witness if he would sign a paper for him. They met by appointment; the testator produced a paper which he so folded that they could not see the writing upon it, and observed 'You are aware that there has been a change in my circumstances, which involves an alteration in my affairs.' They then signed the paper at his request. They did not see his signature, but they understood his remark to refer to the death of his wife, and believed that they were signing his will.

Dr. Tristram for the plaintiff, who propounded the instrument.

Dr. Spinks (with him *Searle*) for the defendants, who opposed probate.

Lord PENZANCE held (following the decision in *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200; s. c. 29 Law J. Rep. (N.S.) Prob. M. & A. 31), that the circumstances of the case warranted the conclusion that the signature of the testator was on the paper at the time of execution, and that there was a sufficient acknowledgment of it. He therefore decreed probate of the will.

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Courts of Equity.

LORD HATHERLEY, L.C. } RUSHBROOK *v.* LAWRENCE.
Nov. 16.

Mortgagor and Mortgagee—Agreement to Release Equity of Redemption.

The bill was filed by the heir-at-law of a mortgagor for an account of the proceeds of sale of the mortgaged property under a power of sale in the mortgage.

So long ago as 1825, Frederick Rushbrook, the plaintiff's father, mortgaged the property in question to John Ingle for 1,000 years to secure 600*l.* and interest, and in 1835 he further charged the term with 200*l.* and interest.

In 1837, in consideration of 200*l.* advanced by A. Chevell, he conveyed the property to Chevell in fee upon trust to sell, and out of the proceeds to satisfy the mortgage debts, interest, and costs, and to pay over the surplus to the person who would have been entitled to the equity of redemption if the property had not been sold.

The mortgagor died, in 1841, intestate, leaving the plaintiff, a child of ten or eleven years of age, his heir. The plaintiff came of age in 1852, and took possession of the property. In 1853 the representatives of the mortgagees commenced a joint action of ejectment, but before the day fixed for trial an agreement was come to between the parties that the plaintiff should give up the possession of the property at Michaelmas following, and, if required, should execute to the mortgagees a release of all his right, claim, and interest therein, and that the mortgagees should abandon their claim to the costs of the action; but if default should be made by the mortgagor in carrying out the arrangement, the mortgagees should be entitled to the costs.

No release was ever executed or required, nor did the mortgagees take possession of the premises; but in 1865 the property was sold by the defendant Lawrence, the devisee of Chevell for 3,245*l.* The plaintiff claimed the surplus of this sum after payment of the mortgage debts, interest, and costs. The defendant claimed to retain that surplus under the agreement.

The MASTER OF THE ROLLS held that the agreement of 1853, never having been acted upon, could not now be set up against the plaintiff's claim, and made a decree in favour of the plaintiff.

The defendant appealed from this decision; but

The LORD CHANCELLOR affirmed it.

Sir R. Baggallay and *Mr. G. N. Colt* appeared for the appellant, and

Mr. Southgate and *Mr. Rigby* for the respondent.

GIFFARD, L.J. } *In re* BLAKELY ORDNANCE CO. (LIM.)
Nov. 19. } CREYKE'S CASE.

Company—Winding-up—Contributory Past Member—Forfeited Shares.

The question on this appeal from a decision of the MASTER OF THE ROLLS was whether a person whose shares had been forfeited could be put upon the list of contributories as a past member. The MASTER OF THE ROLLS held that he ought to be on the list.

Mr. Jessel and *Mr. Speed* for the appellant.

Sir R. Baggallay and *Mr. Higgins*, for the official liquidator, were not called upon.

His LORDSHIP held that whether shares were transferred or forfeited, the former owner (the conditions being fulfilled) was equally liable to be placed upon the list of contributories as a past member.

GIFFARD, L.J. } *In re* NATIONAL PROVINCIAL INSURANCE
Nov. 19. } COMPANY. SINGER'S CASE.

Company—Purchase by Company Ultra Vires—Subsequent Adoption of Personal Liability by Directors.

Mr. Singer was the owner of 130 shares in this company, and being, amongst others, dissatisfied with certain arrangements relative to the disposal of part of the company's business, threatened to take proceedings. A resolution was passed by the directors to purchase the shares of the dissentients, which was accordingly done, the shares being transferred to a clerk of the company as a trustee for the company, and the price paid out of the funds of the company. Afterwards the auditors of the company raised objections to the accounts so far as related to this transaction. Thereupon the directors, out of their own moneys, reimbursed the company the sum laid out in the purchase of the shares. Some of the shares remained standing in the name of the same clerk; others were transferred, by the direction of the directors, to other nominees, who were not persons of substantial means. In his LORDSHIP'S opinion, the purchase by the company of the shares was a transaction *ultra vires*. The question was whether Mr. Singer, who knew that his shares were purchased by the company, could be placed upon the list of contributories as a present member on the company being wound up, upon the ground that the whole transaction was void. The MASTER OF THE ROLLS refused to place him upon the list, and the official liquidator appealed.

Sir R. Baggallay and *Mr. Bagshawe* were for the appellant.

Mr. Jessel and *Mr. L. Webb* were for the respondent Mr. Singer.

His LORDSHIP held that, though the original transaction between Mr. Singer and the company was invalid, so that if the company had been wound-up immediately after Singer had transferred his shares to the clerk, he would have remained liable as being still the owner of the shares, yet the subsequent adoption of the purchase by the directors personally had the effect of releasing him. He therefore dismissed the appeal with costs.

LORD ROMILLY, M.R. Nov. 20, 22. } THRUPP *v.* GOODRICH.

Construction of Order of Court—Life Interest—Power to Appoint by Will.

The testator in this cause had directed his residuary property to be laid out in the purchase of an annuity for the joint lives of two married women, without power of anticipation.

It was found, however, that a greater income would be obtained by a permanent investment than by the purchase of an annuity, and, on application of the parties interested, the fund was invested; and it was ordered that the dividends should be paid to the two married women, and that they should each have a power of disposing of half the property by will.

One of the parties having died intestate, the question arose whether the survivor took the whole, or whether one half was to go to the representatives of the deceased lady.

Sir R. Palmer, *Mr. Southgate*, and *Mr. Chitty* for the husband of the deceased lady.

Mr. Jessel, *Mr. Hardy*, and *Mr. Cookson* for the survivor.

Sir R. Palmer replied.

Nov. 22.—The MASTER OF THE ROLLS said the order might have gone beyond the power of the Court, but it could not now be impeached. It must, however, be construed strictly, and there was no provision as to what was to be done with the fund in case of the parties interested dying intestate. The fund must go according to the provisions of the will, and the survivor would take the whole fund.

STUART, V.C. Nov. 11. } *In re* ASIATIC BANKING COMPANY. COLLUM'S CASE.

Winding-up—Contributory—Provisional Certificate—Holder not Bound to take Shares—Forfeiture.

The original capital of this company, which was established under a royal charter dated February 19, and a deed of settlement dated April 11, 1864, was 500,000*l.*, in 25,000 shares of 20*l.* each.

On January 3, 1865, the capital was increased to 1,000,000*l.* by the creation of 25,000 new shares of 20*l.* each, which were issued by the directors at 15*l.* premium on each 20*l.* share.

On January 27, 1865, Dr. Collum, who was not the holder of any original shares, applied on one of the printed forms for 100 new shares. On February 10, 1865, the manager of the company wrote to Dr. Collum stating that the directors had allotted him 35 shares, and requesting him to pay 350*l.*, being 2*l.* 10*s.* per share in respect of capital and 7*l.* 10*s.* per share in respect of premium. At the foot of the letter was a statement that the letter of allotment, after having been presented to the company's bankers for their signature to an annexed receipt, must be retained by the allottee until exchanged for the usual certificate. On February 15, 1865, Dr. Collum paid the 350*l.*, and received a receipt from the bankers, and, before the issuing of the certificate, sold, through his broker, twenty-five of the shares to a purchaser who was subsequently accepted and placed on the register. On March 21, 1865, the directors issued to Dr. Collum thirty-five provisional certificates. Each of these certificates certified that the holder, having paid the first instalment of capital and premium, would be entitled, on payment of the second instalment thereof, to be registered as the proprietor of a new share, and contained a proviso that, in default of payment of the second instalment on or before June 30, 1865, 'the amount paid, together with all the rights and privileges appurtenant to this certificate, will be forfeited.'

Dr. Collum did not pay the second instalment, and was not registered as proprietor of the other ten shares; and two years afterwards, the company having been ordered to be wound up, the liquidator placed his name upon the list of contributories in respect of these ten shares. Dr. Collum then took out a summons for the removal of his name from the list, and that summons was now adjourned into Court.

Sir R. Palmer, *Mr. A. E. Miller*, and *Mr. Chitty* for Dr. Collum.

Mr. Dickinson and *Mr. Kekewich*, for the liquidator: There was a contract to take shares, and the proviso in the certificate was intended for the benefit of the company, and not of the shareholder, who could not by breaking his contract avoid his liability.

STUART, V.C.: It has been decided that these provisional certificates do not bind the holder to take shares. Dr. Collum forfeited these ten shares by his default in payment, and his name must be removed from the list; the liquidator to have his costs out of the estate.

STUART, V.C. Nov. 16. } WILLIAMS *v.* THE EAST LONDON RAILWAY COMPANY.

Vendor and Purchaser—Railway Company—Lessee—Purchase of Part of the Property—Apportionment of the Rents—Agreement—Lands Clauses Consolidation Act, 1845, *s.* 119—*Notice to Lessor.*

This was a specific performance suit. The plaintiff was the lessee of certain property, of which the defendants agreed with him for the purchase of part only. The plaintiff's term would expire in 1905. The agreement, which was executed in 1867 by the plaintiff and the defendants, provided for an apportionment of the rents of the sold and unsold portions of the property, 'according to the provisions of the Lands Clauses Consolidation Act, 1845, s. 119, if necessary.' Disputes arose between the parties. The plaintiff continued in possession of the property, and the defendants neglected to pay the purchase-money, 120*l.*, and otherwise, to complete their contract. In particular, they refused, when requested by the plaintiff, to give notice to his lessor of an intention to treat with him for his interest in the property. The plaintiff then took out two summonses under the Lands Clauses Consolidation Act, 1845, which came on to be heard under the 2 & 3 Vict. c. 71, and the 21 & 22 Vict. c. 73, before a metropolitan police magistrate, with a view to the settlement of the apportionment of the rents. The magistrate, however, refused to make any order on the summonses, unless the defendants would give the plaintiff's lessor the notice. The defendants refused to do so, as they did not wish to buy his interest; and the magistrate ultimately dismissed the summonses. The plaintiff thereupon filed his bill in this suit to enforce the contract, and prayed for an order directing the defendants to serve the plaintiff's lessor with the notice.

Mr. Dickinson and *Mr. Ellis*, for the plaintiff, were in the course of their opening stopped by the Court.

Mr. Greene, *Mr. Fooks*, and *Mr. W. Fooks*, for the defendants, insisted that they could not be compelled to give the notice. It was not necessary to the completion

of the contract. As to that, the plaintiff was bound to do all that was requisite to perfect his own title and confirm the defendants in theirs. For that purpose the due apportionment of the rents was essential.

Mr. Dickinson, in reply, said the fact was that the lessor would not give his consent to the apportionment. In order, therefore, to save the plaintiff harmless as against his own lessor, the defendants ought to purchase the lessor's interest in the property, and to give him the proper notice. The plaintiff would not be sufficiently protected by the mere covenant or indemnity of the defendants.

STUART, V.C.—No doubt there was in this case an agreement executed by the plaintiff and the defendants, the company; and an integral part of that agreement was that an apportionment of the rents of the property should be made, in accordance with the Lands Clauses Consolidation Act, 1845, s. 119, 'if necessary.' Considering the nature of the property, that necessity was apparent. It was never, in fact, denied by either party, but rather admitted by both, for they went before one of the metropolitan magistrates to get the matter settled. The magistrate, however, refused to make any order unless the defendants served the plaintiff's lessor, who was not a party to the agreement between the parties to this suit, with a notice to treat for his (the lessor's) interest in the property. The defendants, who did not wish to purchase that interest, declined to give the notice. The magistrate then dismissed the summonses. The plaintiff then filed his bill in this suit against the defendants for the specific performance of their agreement, and asking that they might be ordered to serve the lessor of the plaintiff with a notice of their intention to treat with him. That, however, was an order which this Court could not make. But the apportionment was one that should be made, and for that purpose the plaintiff was entitled to a decree that the defendants should concur with him in doing all that was necessary and proper for carrying out their agreement, having regard to the precise terms of it, and to the provisions of the Lands Clauses Consolidation Act, 1845. This suit had been really occasioned by the results of the application to the police magistrate; but as that involved mistakes on both sides, and as the plaintiff had asked for more by his bill than he was entitled to, the fair thing was for each party to bear their own costs of this suit, subject so that there must be the usual decree for specific performance, modified as already stated.

STUART, V.C. Nov. 20. — *Re* THE PROVIDENT CLERKS' MUTUAL LIFE ASSURANCE ASSOCIATION. *Ex parte* MOSELEY'S POLICY.

Trustees' Relief Acts—Payment of Money out of Court—Petition—Solicitors—Respondents—Costs.

This was a petition for the payment out of Court of a sum of 589*l.* 6*s.*, paid in by the above-named association under the Trustees' Relief Act. The facts of the case were shortly these:—Robert Moseley effected a policy of assurance on his life with the association. In December 1866 he mortgaged the policy, and in April 1869 he died. The money due on the mortgage was paid out of the policy moneys, leaving the above-mentioned balance in the hands of the association. Messrs. Le Blanc & Torr, solicitors for some of the alleged creditors of Robert Moseley's estate, sent a notice to the association not to pay the balance so in their hands to any claimant, as a suit was about to be instituted for the administration of Mr. Moseley's estate, and they (Messrs. Le Blanc and Torr) would probably represent the parties to be appointed to get it in. In consequence of that notice, the association paid the 589*l.* 6*s.* into Court under the Act. This petition was presented by the widow and executor of Robert Moseley, and the trustees of a settlement. The petition showed that the petitioners were the parties originally, and, in fact, entitled to the fund in the Court. Messrs. Le Blanc & Torr were, therefore, made respondents to the petition. It prayed that they might pay the costs of it, and of the payment of the money into Court.

Mr. Bristowe and *Mr. Winterbotham*, for the petitioners, said that there was no ground whatever for the notice given by Messrs. Le Blanc & Torr, either on their own account or that of any other person.

Mr. Dickenson and *Mr. D. Gardner* were for Messrs. Le Blanc & Torr

Mr. Villiers was for the association.

Mr. Roche, for one of the alleged creditors of the estate, but who was not a respondent to the petition, was not heard.

STUART, V.C., made an order for payment of the money out of Court to the petitioners as prayed by the petition; but said that Messrs. Le Blanc & Torr ought not to have been made respondents to it, that both they and the association must have their costs of it; but that, to avoid the expense of a taxation—the sum of 3*l.* only should be allowed as the costs of the former parties.

MALINS, V.C. Nov. 19. — *Re* NATIONAL AND PROVINCIAL LIFE ASSURANCE SOCIETY.

Winding-up Petition—Service of—No Place of Business—Merger of Company.

Mr. Wickens applied to the Court with reference to the sufficiency of service of a petition to wind up the above company, which, after a series of successive mergers, was now represented or supposed to be represented by the Albert Life Assurance Society, having ceased to carry on business on its own account some thirteen years ago. The only officers of the company of whom any trace could be discovered were the auditor, one of the trustees, and one director who was abroad. There was no official place of business to which any notice could be addressed. Under the circumstances it was proposed to serve the petition upon the auditor and the trustee of the original company, and also upon the official liquidator of the Albert Assurance Society now in course of winding-up.

MALINS, V.C., thought that such service would be sufficient, with the usual advertisements as prescribed in the general orders.

MALINS, V.C. Nov. 11. — SOLLORY *v.* LEAVER.

Annuity—Power of Distress—4 Geo. II. c. 28, s. 5—Receiver—Refusal to Appoint.

This was a motion for a receiver of certain lands and tenements in Nottingham, which had been devised in 1824 by John Sollory to his son James in fee, subject to the payment of an annuity of 36*l.* to the plaintiff Thomas Sollory during his life.

This annuity was regularly paid up to June 1867, but

having been unable to obtain any further payments since that time, the plaintiff now filed his bill against the representatives of James Sollory, who died in 1843, for payment of the arrears and the appointment of a receiver.

Mr. A. E. Miller for the plaintiff, and

Mr. L. Field, for the mortgagees of the estate, supported the motion.

Mr. J. W. Chitty, for the defendants, opposed the motion, on the ground that the plaintiff had a simple remedy by distress under the statute 4 Geo. II. c. 28, s. 5.

MALINS, V.C., although thinking that the appointment of a receiver would probably be the most beneficial thing for all persons interested in the estate, felt bound to refuse the motion, on the ground that it was not the province of the Court to help persons who had a sufficient remedy in their own hands. Here was an annuity clearly charged upon real estate, and by the terms of the statute a power of distress was superadded, which the plaintiff could exercise without the assistance of this Court.

MALINS, V.C. Nov. 16, 17. } POUPARD *v.* FARDELL.

Patent, Validity of—Ambiguity in Specification.

This was a suit to restrain the defendant from infringing the plaintiff's patent for constructing skids or shoes for the skidding of wheels. The specification (which was accompanied by drawings), after describing the plaintiff's mode of construction with reference to the projecting tail-piece which formed the subject of the patent, proceeded thus:—'This tail-piece may be carried entirely through to the front of the shoe, and I prefer to form it of wrought iron or steel, while the body of the shoe may be made of cast or wrought iron. I find the best results to be obtained when the projecting tail-piece is carried upwards, but I do not limit myself to so shaping it.'

It was contended, on the part of the defendant (who also attempted to establish prior user and want of novelty), that the above was a defective description, and particularly that the last clause of the specification was so ambiguous as to invalidate the patent.

Mr. Glasse and *Mr. Bovill* for the plaintiff.

Mr. Mackeson, *Mr. Stevens*, and *Mr. W. W. Cooper* for the defendant.

MALINS, V.C., having found upon the evidence that the patent was good in respect of novelty, held also that the specification was sufficient. It would have been safer and better for the plaintiff to omit the final clause, but having regard to the more liberal construction now conceded to the specifications of patentees, his HONOUR thought there was no such ambiguity in the language used by the plaintiff as to mislead the public or avoid the patent. Injunction granted with costs of suit.

MALINS, V.C. Nov. 15, 17. } WALTERS *v.* WEBB.

Copyholds—Seizure Quousque—Adverse Possession by Lord—Statute of Limitations, 3 & 4 Wm. IV. c. 27—Demurrer.

The object of this bill was to compel the lord of the manor of Wenteland, in Monmouth, to admit the plaintiff to certain copyholds of which the plaintiff claimed to be tenant in fee as customary heir-at-law of his grandfather, William Walters.

The bill stated that upon the death of William Walters, which took place in 1831, no tenant appearing to demand admittance, the lands had been seized *quousque*, thenceforth to be held by the lord in trust for the person or persons entitled to be admitted thereto. The lord had continued in possession under such seizure up to the present time.

The defendants to the bill demurred on the ground that the plaintiff's claim was barred by the Statute of Limitations, 3 & 4 Wm. IV. c. 27.

Mr. Wickens, *Mr. Cracknall*, *Mr. Osborne*, *Mr. Bristowe*, and *Mr. Kekewich* supported the demurrers.

Mr. Glasse, *Mr. Cotton*, and *Mr. Bradford*, for the bill, argued that it was not in form a suit for the recovery of land, but merely to compel the lord to do his duty by admitting the rightful tenant, and that the Statute of Limitations had no application to a seizure *quousque*, which, being an estate interposed by operation of law for an indefinite duration of time, was not such as to constitute adverse possession within the meaning of the statute.

MALINS, V.C., held that this was in effect a bill for the recovery of land, its real object being to put the plaintiff in possession; that, whether the possession of the lord was adverse or not, there had in fact, as against the plaintiff, been a dispossession or discontinuance of possession for more than twenty years, and that was a sufficient bar to his claim.

Demurrers allowed.

MALINS, V.C. Nov. 18. } *In re* HEATON'S STEEL AND IRON COMPANY (LIMITED). SIMPSON'S CASE.

Companies Act 1862, s. 35—Rectification of Register—Summary Application Refused.

Motion to remove Mr. Simpson's name from the register of shareholders for 1,708 shares, the company not being in liquidation.

The company contended that Simpson had guaranteed that the above shares should be taken by shareholders in the Langley Mill Company, of which he was chairman, or if not, that he would take them himself.

Simpson contended that the above guarantee was intended to operate only upon the completion of a proposed sale of the Langley Company's business to the Heaton's Company, which proposal had never been carried into effect.

Mr. Cotton and *Mr. Simpson* for the motion.

Mr. Glasse and *Mr. Cracknall* for the company.

The VICE-CHANCELLOR observed that by the authorities a summary application of this sort to remove a name from the register of a company under the Companies Act 1862, s. 35, could only be made where the circumstances were clear; they could not be said to be clear in this case, and he must refuse the motion, without prejudice to filing a bill.

MALINS, V.C. Nov. 18. } *In re* THE POTTERIES, SHREWSBURY, AND NORTH WALES RAILWAY COMPANY'S SCHEME.

Railway Company—Scheme of Arrangement—Railway Companies Act, 1867—Holder of Debenture having obtained Judgment thereon.

One Minors was a creditor of this company by a judg-

ment obtained by him in an action on a debenture of the company for 440*l.* Execution had been issued, and the sheriff was now in possession of certain rolling stock. A scheme of arrangement between the company and its creditors had since the date of the judgment been sanctioned under the Railway Companies Act 1867, whereby the interests of mortgage and debenture-holders were specially provided for.

The company now moved that the sheriff be restrained from continuing in possession, on the ground that the creditor as a debenture-holder was bound by the above scheme, which had been duly assented to as therein required.

The creditor moved on his side for leave to sell the rolling stock in the hands of the sheriff, contending that he was no longer a debenture-holder, but a judgment creditor, and therefore, according to the authorities, not bound by the scheme.

Mr. Osborne and *Mr. Dryden* for the company.

Mr. Glasse and *Mr. Locock Webb* for the creditor.

Mr. Bedwell for the sheriff.

MALINS, V.C., said that though the creditor had obtained judgment on his debenture, yet that he was primarily and essentially a debenture-holder, and therefore bound by the assent of the other debenture-holders under the scheme of arrangement. His motion must be refused and that of the company allowed.

MALINS, V.C. Nov. 19. } WILSHIN'S TRUSTS.

Power, Discretionary Exercise of, by Two Executors or the Survivor—Penal Servitude of One—Discretion of Court.

Testator bequeathed 1,000*l.* to his two executors upon trust to pay the income to the petitioner for life, subject to a proviso that the executors, or the survivor of them, should have full power, in their or his discretion, to pay over the whole fund to the petitioner absolutely at any time after his attaining the age of twenty-five, and thereupon the trusts of the said fund should cease.

The fund was now in Court, and the petitioner prayed for payment out to himself; one of the executors, however, was undergoing penal servitude, and his consent to the exercise of the power could not be obtained.

Mr. Alexander for the petition.

Mr. Bedwell, for the other executor, consented.

MALINS, V.C., held that the Court had no discretion, and declined to make the order without the consent of the absent executor.

JAMES, V.C. Nov. 16, 17. } PREES *v.* COKE.

Evidence against a Dead Man—Burden of Proof—Inequality of Contracting Parties—Sale set Aside after Fourteen Years.

This was a suit to set aside a sale purporting to have been made by a deed executed in 1854, on the ground of undervalue and misrepresentation. The subject-matter of the suit was the equity of redemption in two farms formerly held by the plaintiff on a lease for three lives, none of the lives having dropped, but all the *cestuis que vie* being over sixty at the date of the transaction. The annual value of the property, after deducting all outgoings (including interest on the mortgage debt), appeared to be about 70*l.* Some time before the sale the interest had fallen in arrear, and the mortgagee had taken possession, and had subsequently obtained a decree for foreclosure, the Master finding that 600*l.* was due for principal, interest, and costs; but, for some reason which did not appear, the order was never made absolute, and the mortgagee having died intestate, his administrator remained in possession till he also died, since when there had been no representation to the estate of the original mortgagee. The bill alleged that Coke, who, as a member of the firm Coke & Jones, the solicitors of the mortgagee, knew that the foreclosure had never been made absolute, while the mortgage debt must have been largely reduced, if not entirely liquidated by the receipts of the mortgagee and his representative since they had been in possession, persuaded the plaintiff, who was then in great poverty, that his interest in the property was merely nominal, and induced him to assign it for 50*l.* by a deed, which he never saw till the moment of execution. Coke afterwards obtained an assignment of the mortgagee's interest, and sold a small part of the property to a railway company for 350*l.* He was preparing to sell the remainder, when a difficulty as to the title led to the plaintiff being informed (for the first time, as he alleged) of the truth with regard to the foreclosure. Coke being now dead, the bill was filed against his personal representatives.

The defences were—(1) delay and *laches*; (2) that the suit was virtually that of Coke's partner Jones, who had been a party to the original misrepresentation, but had since quarrelled with his partner's representatives and adopted this means of attack (as to which his HONOUR intimated, in the course of the hearing, that he had no doubt the fact was so, but that it could not affect the right of the plaintiff to relief); (3) that when there was no fiduciary relation between the parties, the Court could not look at the question of undervalue apart from misrepresentation; and (4) that the charge of misrepresentation rested on the unsupported evidence of an old man of weak memory and defective education, which the Court would never listen to as against a dead man.

Mr. Kay and *Mr. Fischer* for the plaintiff.

Mr. Eddis and *Mr. Marten* for the defendant.

JAMES, V.C., thought there was much force in the argument that nothing would be safe if such evidence as that of the plaintiff were to be relied on; and as both parties might under the circumstances be well excused for not calling as a witness the only other man who knew anything about the matter, namely Jones; that evidence would be unsupported if there were not other corroborating facts, to a great extent admitted by the defendants themselves. But it appeared from an affidavit put in on their own side that the plaintiff had been led to suppose that the mortgagee was calling in his money, and threatening him with legal proceedings unless he made the assignment in question, while, on the other hand, there was no trace whatever of his having been told what Coke must have known, that he had a real interest in the property. The assignment itself was so drawn as to look more like a deed for getting in an outstanding legal estate than a sale. The plaintiff was at that time penniless and without advice, and executed the deed without having seen it beforehand. Clearly such a transaction could not stand unless Coke's representatives could prove it to be fair, conscientious, and reasonable. His HONOUR was of opinion that it was not a fair transaction; the sale must therefore be set

aside (the deed standing as a security for the sum of 50*l.*), and the defendant must pay the costs of the suit.

JAMES, V.C. Nov. 20. } *In re* THE IMPERIAL GUARDIAN ASSURANCE CO.

Winding-up—Disputed Debt—Action at Law—Costs.

This was a petition for a compulsory winding-up, presented by a creditor whose debt the company disputed, and who had already commenced an action at law to recover it. The company was in course of being wound up voluntarily.

Mr. Amphlett and *Mr. Hemming* in support of the petition.

Mr. Kay and *Mr. Higgins* for the company.

JAMES, V.C., proposed to follow the precedent of *The Catholic Publishing Company*, by adjourning the petition till the debt should be established at law, the liquidators giving an undertaking to be personally liable for costs, and refused to adopt Mr. Amphlett's suggestion as to putting the company upon terms not to delay the action; but upon Mr. Kay mentioning that the company had made an offer before the presentation of the petition to pay the amount claimed into Court, to let the petition stand over till the action should have been tried, and to pay such costs of the petition as the Court should adjudge, his HONOUR ordered further that the petitioner should pay all costs of the petition since that offer was made. He added that he was determined, if possible, to prevent these winding-up petitions from being used as an excuse for obtaining costs.

JAMES, V.C. Nov. 19. } WORMS *v.* SMITH.

Injunction—Undertaking as to Damages.

This was a motion for an injunction in a light and air case. No point of law was discussed, but on the plaintiff declining to give an undertaking as to damages, JAMES, V.C., took occasion to state that, so far as he was concerned, he was determined never to give an interlocutory injunction without such an undertaking, where there was any serious question to be tried; and he considered that there was a serious question if one credible witness would swear that there was not a material diminution of light. The motion was therefore ordered to stand over to the hearing.

Mr. Amphlett and *Mr. D. Gardiner* were for the plaintiff.

Mr. Morgan and *Mr. Locock Webb* for the defendant.

Courts of Common Law.

Queen's Bench. Nov. 15. } BARBER *v.* FLEMING.

Marine Insurance—Inception of Risk—Insurance at and from Port.

In this case the question was whether the underwriters were liable upon a policy on the freight of the ship Cambodia. The owners of the Cambodia, on August 7, 1866, entered into a charter-party for the ship 'now lying in the harbour of Bombay' for a voyage from Howland's Island to a port of discharge in Great Britain. The owners, on September 7, 1866, effected a policy on the vessel 'at and from Bombay to Howland's Island, while there, and thence to any port or ports, place or places of call and discharge in the United Kingdom, &c.' The insurance was on freight chartered or otherwise valued at 3,600*l.* against the usual perils. The Cambodia, after leaving Bombay, sustained such injuries from perils of the sea that she was obliged to put into New Zealand, where the owners abandoned the vessel to the bottomry bondholder.

Manisty, for the plaintiff, contended that, although the vessel had never reached Howland's Island, yet the risk on the freight had commenced when the vessel sustained her injuries.

Milward and *Fullarton*, for the defendant, contended that the ship, in leaving Bombay, did not sail under the charter-party, and that nothing required by the charter-party as a step towards earning the freight had been done.

The COURT (COCKBURN, C.J., BLACKBURN, J., HANNEN, J., and HAYES, J.) gave judgment for the plaintiff, adopting the law laid down in 'Phillips on Insurance,' vol. i. pp. 504—508. So long as there was only a hope that the freight would be earned, the risk upon it did not attach; but as soon as any step had been taken towards earning the freight under the charter-party, there was an inchoate interest in the chartered freight which was covered by the policy.

Judgment for the plaintiff.

Queen's Bench. (*Magistrates' Case.*) Nov. 17. } MERCER *v.* WOODGATE.

Highway—Right of Ploughing up the Surface of Footpath—Limited Dedication.

Upon a case stated by two justices of Worcestershire, under 20 & 21 Vict. c. 43, it appeared that the appellant had been convicted under 5 & 6 Wm. IV. c. 50, s. 72, for destroying and injuring the surface of a highway, by ploughing it up. A footway from Belbroughton to Fairfield ran diagonally through a field of which the defendant was occupier. There was no evidence of the existence of this footpath before living memory, and no evidence of any limited dedication of the way to the

public. If appeared, however, that within living memory it had been used as a footway by the public, and that the appellant and the previous occupier had, during all this time, ploughed it up in the manner now complained of.

Harington for the appellant.

Rew, for the respondent, argued that although a highway might be dedicated subject to an existing obstruction upon it, yet that it could not be dedicated subject to a right to obstruct it *de novo* from time to time.

The COURT (COCKBURN, C.J., BLACKBURN. J., MELLOR, J., and HANNEN, J.) gave judgment for the appellant, quashing the conviction. The proper inference from the facts was, that the exercise of the right of ploughing up the path had been coeval with the user of the way by the public. The way must therefore be considered as having been dedicated and accepted by the public subject to the inconvenience of being occasionally obstructed.

Judgment for the appellant.

Queen's Bench. (*Magistrates' Case.*) Nov. 17. } COCKER *v.* CARDWELL & OTHERS.

Nuisance Removal Acts, 18 *&* 19 *Vict. c.* 121; 23 *&* 24 *Vict. c.* 77; 29 *&* 30 *Vict. c.* 90—*Nuisance on Private Premises—Notice not required upon Information under* 23 *&* 24 *Vict. c.* 77, *s.* 13.

Case stated by Justices of the West Riding of York under 20 & 21 Vict. c. 43.

By 23 & 24 Vict. c. 77 (an Act amending 18 & 19 Vict. c. 121), s. 13, a justice of the peace, upon the complaint of any inhabitant of any parish or place of the existence of any nuisance on any private premises in the same parish or place, may issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises; or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before two justices, who shall proceed to inquire into the complaint, &c.

By 29 & 30 Vict. c. 90, s. 14, the expression 'Nuisance Removal Acts' shall mean the Acts 18 & 19 Vict. c. 121; 23 & 24 Vict. c. 77 as amended by part 2 of 29 & 30 Vict. c. 90, and part 2 of the latter Act shall be construed as one with the first two Acts. By 29 & 30 Vict. c. 90 (part 2), s. 21, the nuisance authority or chief officer of police shall, previous to taking proceedings before a justice under 18 & 19 Vict. c. 121, s. 12, serve a notice on the person by whose act, default, or sufferance the nuisance arises, &c.

The respondents were summoned upon an information by the appellant under 23 & 24 Vict. c. 77, s. 13, charging them with allowing a chimney to send forth black smoke in such quantity as to become a nuisance. Upon the hearing the question arose whether, upon an information under this section, a notice was required to be given, as under 29 & 30 Vict. c. 90, by the nuisance authority or chief officer of police. The justices were of opinion that such a notice was required.

Jelf, for the appellant, now contended that no such notice was required.

No counsel appeared for the respondents.

The COURT (COCKBURN, C.J., BLACKBURN, J., MELLOR, J., and HANNEN, J.), after commenting upon the slovenly manner in which the Acts had been prepared, gave judgment for the appellant on the ground that the statutes had unintentionally, as it appeared, made no provision for notice in a proceeding like the present.

Judgment for the appellant.

Common Pleas. Nov. 18. } BRISTOW AND ANOTHER *v.* BOOTH.

Copyhold—Lord's Right to more than One Fine on Admittance—Appointment of New Trustee under Trustee Acts, 13 *&* 14 *Vict. c.* 60, *and* 15 *&* 16 *Vict. c.* 55.

Special case raising the question whether the plaintiffs as lords of the manor of Woodford, in Essex, were entitled to more than one fine on the admittance of the defendant as customary tenant of such manor. It appeared that the last tenant who had been admitted before the defendant was one Peter Paterson the younger. He had no beneficial interest in the property, but was simply a trustee thereof, and he died, leaving a widow, to whom he devised his property, but who disclaimed the trust estate. Peter James Paterson the son, and customary heir of the deceased trustee Peter Paterson the younger, went abroad and never acted in the trusts; and thereupon the Court of Chancery made an order under the Trustee Acts, 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, appointing the defendant as trustee in substitution of the said Peter Paterson the younger.

Archibald (*Cowie* with him), for the plaintiffs, contended that on the disclaimer of the devisee the estate had devolved on the customary heir, Peter James Paterson, through whom the defendant must be deemed to claim a right to be admitted, and that therefore two fines were payable.

Joshua Williams (*J. O. Griffits* with him), for the defendant, contended that the effect of the order under the Trustee Acts was to vest the estate of the last-admitted Trustee, Peter Paterson the younger, in the defendant, as if such trustee had before his death surrendered it to the use of the defendant; and there being, therefore, only one devolution of title, only one fine was payable on the defendant's admittance.

The COURT was of opinion that the defendant's contention was the right one, and therefore gave

Judgment for the defendant.

Common Pleas. Nov. 19. } HORSEY *v.* GRAHAM.

Statute of Frauds, 29 *Car. II. c.* 3, *s.* 4—*Contract to Procure Lease of House—Interest in Land.*

This was an action for the breach of an agreement to procure a lease from a third party to the plaintiff of a public house, and one of the questions was whether such an agreement was a contract of any interest in or concerning land within section 4 of the Statute of Frauds (29 Car. II. c. 3), as the defendant himself had no interest in the house.

Henry James and *Turner* showed cause against a rule to enter a verdict for defendant or for a new trial.

Garth and *A. L. Smith* in support of the rule.

The COURT held that it was a contract within section 4, and must therefore be in writing, but they granted a rule for a new trial in order to ascertain if a written contract could be proved.

Rule for new trial.

Common Pleas. Nov. 17, 20. } DURANT *v.* KENNETT.

Parliament—Borough Vote—Naval Knights of Windsor.

The question raised in this case was whether the Naval Knights of Windsor were entitled to vote for the borough of New Windsor in respect of the houses they occupied as knights; and this turned on the provisions and wording of a lengthy charter.

H. James for the appellant.

H. Matthews for the respondent.

The COURT, looking to the provisions and wording of the charter of incorporation of these knights, held that the corporation was of a collegiate character, that the knights occupied their houses only as members of and for the convenience of carrying out the objects of such corporation, and had no such exclusive or personal rights as to constitute a several property in or occupation of their houses by them respectively; and that consequently they did not occupy as tenants or owners, and were not entitled to votes.

Common Pleas. Nov. 23. } FORD (APPELLANT) *v.* HARINGTON (RESPONDENT)

Parliament—Registration Appeal—Borough Vote—Corporation—Residentiary Canon.

The respondent was one of the canons residentiary of the cathedral church of St. Peter in Exeter, and the revising barrister decided that the respondent was entitled to be on the list of voters for the city of Exeter, as owner and occupier of the residentiary house belonging to him in respect of his canonry.

It appeared from the case that the dean and chapter were a corporation aggregate, consisting of the dean and five residentiary canons, and sixteen non-residentiary prebendaries. It appeared also that there were five houses, which the five canons, who were appointed for life, were entitled to occupy, and with their enjoyment thereof the chapter, as a body, could not interfere.

Kingdon for the appellant.

Phillpotts for respondent.

The COURT held that the respondent held the house to which he was entitled in right of his canonry in his own right as a corporation sole, and not as a member of the corporation aggregate, and therefore the case was distinguishable from that of the Naval Knights of Windsor decided this term, and the respondent was entitled to the franchise.

Decision affirmed.

Common Pleas. Nov. 16, 23. } COLES *v.* PACK.

Guarantee—Continuing—Consideration.

The plaintiff, a coal factor, had for some years been in the habit of supplying one David French with coals, and the defendant had annually given guarantees for the amount which might be due from French to the plaintiff for such coals. The last of such annual guarantees was given on April 3, 1867, and expired on April 1, 1868. On July 23, 1867, the defendant gave the plaintiff a guarantee, which, after reciting that French was indebted to the plaintiff in the sum of 2,205*l.* 3*s.* 9*d.* upon an account then stated, in addition to his liability upon two acceptances of the defendant for 750*l.* each, endorsed by French to the plaintiff, and that the plaintiff was pressing for the immediate payment of the said 2,205*l.* 3*s.* 9*d.*, was in the following words:—'Now I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of, and agree to become responsible for, any sum of money for the time being due from the said D. Fisher to you, whether in addition to the said sum of 2,205*l.* 3*s.* 9*d.* or no.'

The plaintiff having sued on this last guarantee, and obtained a verdict for upwards of 2,000*l.* in respect of coals subsequently supplied to the said D. Fisher,

Prentice and *F. M. White* showed cause against a rule to set aside such verdict, and to enter a verdict for the defendant.

G. Denman and *Cohen* argued in support of the rule, and the question raised was whether the guarantee was a continuing one or not, and whether the consideration was sufficient.

The COURT held that the guarantee was a continuing one until revoked, without limit as to time or amount for which the defendant was to be responsible, and that being a continuing guarantee as to future supply of coals, there was a sufficient consideration beyond the forbearance to sue.

Rule discharged.

Common Pleas. Nov. 23. } KIRTON (APPELLANT) *v.* DEAR (RESPONDENT).

Parliament—Registration Appeal—County Vote—Perpetual Curate—Freehold Estate of 40s.—8 Hen. VI. c. 7.

The appellant claimed to be on the list of voters for the county of Middlesex, in respect of a freehold benefice in the parish of St. Matthew, Bethnal Green, in the said county. The appellant was the perpetual curate of the church of St. Andrew, Bethnal Green, in the said county, to which church a district chapelry had been assigned by an order in Council under the Church Building Acts. No assignment of pew-rents had been made to the appellant, nor was he entitled to any income from the pew-rents; but the income or emoluments he received as incumbent of such church was from the following sources, viz.: 150*l.* a year from the Ecclesiastical Commissioners, 50*l.* a year from Queen Anne's Bounty, the fees paid in respect of marriages, baptisms, and churchings performed in the said church, and the fees in respect of burials in Bow Cemetery of persons dying within the said district attached to the said church, the income either from these burial fees or from the other fees being more than 40*s.* a year over and above all charges. The revising barrister disallowed the claim.

Sir John Karslake (*Morgan Howard* with him) for the appellant.

Simon, Serjeant (*Michael* with him) for the respondent.

The COURT held that the appellant, though he had as incumbent a freehold office, and a right to the church itself, was not entitled to any land or tenement in the said parish of the clear yearly value of 40*s.*, as none of the emoluments he received as incumbent was derived from the land.

Decision affirmed, but without costs.

Exchequer. Nov. 8. } CONYBEARE *v.* HARRIES.

County Court Appeal—Notice to Produce—Costs.

This was an appeal from a decision of the judge of the

City of London Court, who had directed that a notice given to the defendant to produce 'all letters received by you relating to your tenancy in or about January 1866' was not sufficiently specific. In consequence of the non-production of the letter on which the plaintiff relied to prove his case he was nonsuited.

C. Bowen for the plaintiff, the appellant.

Kemp for the defendant.

The Court (KELLY, C.B., CHANNELL, B., PIGOTT, B., and CLEASBY, B.) held that the notice was sufficient, and that there ought to be a new trial. They also gave the appellant costs, saying at the same time they did not intend to lay down a general rule on the subject.

Judgment for appellant.

Exchequer. Nov. 15. WHITEHOUSE AND ANOTHER *v.* WOLVERHAMPTON AND WALSALL RAILWAY COMPANY.

Compensation to Mine Owner—Railways Clauses Act (8 Vict. c. 20), ss. 77–81.

An arbitrator, appointed under the Lands Clauses Act to assess the amount of compensation to be paid by the defendants to the plaintiffs, the owners of mines lying on both sides of the railway, awarded to them the sum of 1,500*l.*, which he apportioned among various heads of damage. The award stated that, whereas it had been objected by the company that the damage in respect of which compensation was claimed was of such a description that the plaintiffs were not *at present* entitled to recover, or receive compensation for the same or for some part thereof, but must wait until the losses and expenses in respect of which compensation was claimed had been actually sustained and incurred, the arbitrator had stated a case for the opinion of the Court. The case, after describing the nature of the various items in respect of which the compensation was awarded, concluded as follows:—'I have held as a matter of fact, if such finding be admissible and material, that they are all matters *now apparent and capable of being ascertained and estimated*, and I have accordingly awarded compensation in respect of all of them.'

H. Matthews, for the plaintiffs, contended that, *if the damage can be estimated at once*, the mine owner can recover at once, notwithstanding section 81 of the Railways Clauses Act, which enacts that 'the company shall *from time to time* pay to the mine owner all additional losses and expenses, &c.' Otherwise, they must vex the company *de die in diem* every time they spent a small sum of money.

Macnamara, contra, for the defendants, contended that the plaintiffs were precluded by section 81 from recovering more than the loss and expense actually at present sustained or incurred.

The COURT (KELLY, C.B., PIGOTT, B., and CLEASBY, B.) held that the losses and expenses in respect of which they claimed, being imminent and ascertainable in amount, the plaintiffs were entitled to recover.

Judgment for the plaintiffs.

Exchequer. Nov. 16. *Re* THE BEVERLEY COMMISSIONERS. *Ex parte* FLINT AND FITZGERALD.

Bribery Commissioners—Jurisdiction—Adjournment of Meeting, Whether Necessary—Commitment of Witness for Contempt—15 & 16 Vict. c. 57.

Three Commissioners were appointed, under the 15 & 16 Vict. c. 57, to inquire into the existence of corrupt practices in the borough of Beverley. All three of the Commissioners held a meeting on September 25, 1869, and adjourned to September 27. On that day two Commissioners only attended, and, in the absence of the third, took evidence and adjourned to October 19. The Secretary of State had previously given his consent to an adjournment till October 19, in answer to an application made to him by the Commissioners. It appeared also that the adjournment was, in point of fact, agreed upon by all three Commissioners. The three Commissioners met again on October 19, and adjourned till October 21, when they again met, and Flint and Fitzgerald then appeared in answer to a summons as witnesses, and refused to be sworn. The Commissioners then committed them for contempt.

A rule *nisi* had been obtained for a *habeas corpus* on behalf of Flint and Fitzgerald, against which

The *Attorney-General*, the *Solicitor-General*, and *Archibald* now showed cause. They contended that the Commissioners had power under the Act to hold meetings from time to time, and an adjournment was not necessary to the validity of the meeting of October 21.

Sir J. Karslake, *Serjeant Sleigh*, and *Morgan Howard* supported the rule. They contended that the statute only gave power to hold meetings subsequent to the first meeting by adjournment; and that there having been no valid adjournment, the meeting of October 21 was held without jurisdiction, and the Commissioners had therefore no power to commit.

The COURT (KELLY, C.B., CHANNELL, B., PIGOTT, B., and CLEASBY, B.) were of opinion that the statute clearly gave the Commissioners power to hold separate and independent meetings from time to time. This construction by no means made the provision empowering the Commissioners to adjourn nugatory or superfluous, inasmuch as many cases might be supposed in which this power might be useful, as, for instance, in the case of a witness who had been summoned to attend, but whose evidence had not been taken, and who would, in the absence of an adjournment, have to be summoned afresh. They therefore discharged the rule.

Rule discharged.

Court of Criminal Appeal.

Coram KELLY, C.B., MARTIN, B., BYLES, J., BLACKBURN, J., and LUSH, J.

Crown Case Reserved. Nov. 20. } REGINA *v.* HODGKISS.

Bill of Sales Acts—False Statement in an Affidavit—Misdemeanour—Perjury—Indictment—Surplusage.

The prisoner was convicted upon an indictment which charged that he had committed wilful and corrupt perjury in an affidavit sworn by him before a commissioner for taking affidavits in the Court of Queen's Bench. The affidavit was made for the purpose of getting a bill of sale filed, and the prisoner swore that the bill of sale was made on December 18, 1868, when it was, in fact, made on January 4, 1869. The date was material.

No counsel appeared for the prisoner or for the Crown.

Held, that the offence charged was not wilful and corrupt perjury, but was a misdemeanour at common law, and that so much of the indictment as alleged the offence to be perjury might be rejected as surplusage; and the conviction was upheld.

Conviction affirmed.

High Court of Admiralty.

Admiralty Court. Nov. 20, 23. } THE HICKMAN.

Salvage—Award under 300l.—Tender—Costs.

This was a cause of salvage, in which the defendants had tendered the sum of 282*l.*, 'together with such costs (if any) as shall be due by law.' The Court pronounced the tender to be sufficient, and took time to consider whether the Court ought to certify for costs—1st, because the sum awarded was under 300*l.*, and 2ndly, because the Court had pronounced for the sufficiency of the tender.

Dr. Deane and *E. G. Gibson* appeared for the plaintiffs.

Milward and *E. C. Clarkson* for the defendants.

His LORDSHIP allowed the plaintiffs their costs to the time only when the tender was made, and directed that in future, when a tender is made, it should state either that it is a tender for salvage and costs or that it should specify the ground upon which costs are not tendered, and refer the question of costs to the consideration of the Court.

Admiralty Court. Nov. 18, 23. } THE NORTHUMBRIA.

Damage—Limitation of Liability—Date from which Interest is to be Computed.

This was a suit by the owners of the steam-ship Northumbria, the wrong-doing vessel, to limit their liability to the amount fixed by statute. The owners of the Hesperia, the vessel damaged, applied to the Court for costs and interest upon the limited amount from the time of the collision.

Butt and *Steavenson* opposed the payment of interest, and raised the questions: 1. Whether any interest should be paid; 2. If so, from what period the interest must be reckoned.

E. C. Clarkson contended that interest must be allowed from the date of the collision.

His LORDSHIP, after reviewing all the cases upon the question, was of opinion that in all cases where the liability of the owner is limited, interest should be given upon the limited amount from the date of the collision.

Ecclesiastical Cases.

Court of Arches.
Oct. 26, 30.
Nov. 19.
} SHEPPARD *v.* BENNETT.

The Office of the Judge promoted in a Case of Heresy—Inquiry before Commissioners under 3 & 4 *Vict. c.* 86 *—Articles embodying fresh Charge—Refusal to Admit—Practice.*

This was a cause or business of the office of the judge promoted by Mr. Thomas Byard Sheppard against the Rev. William James Early Bennett, a clerk in holy orders, Vicar of Frome Selwood, in the diocese of Bath and Wales, for alleged heresy. The defendant did not appear, and the case now came before the Court on the admission of the articles.

The alleged heresies were contained in certain works, namely, 'Some Results of the Tractarian Movement of 1833,' forming one of the essays contained in a volume entitled 'The Church of the World,' edited by the Rev. Orby Shipley, clerk (1867) and 'A Plea for Toleration in the Church of England, in a letter addressed to the Rev. E. B. Pusey, Regius Professor of Hebrew and Canon of Christ Church, Oxford, second and third edition, 1867-68,' which were published by the defendant within the diocese of London. The Bishop of London issued a commission under the provisions of the 3 & 4 Vict. c. 86 to certain persons to inquire into the truth of the charges; the works in question were laid before the Commissioners, who reported that there was a case for further inquiry; the report and the evidence upon which it was founded were afterwards filed in the registry of the diocese of Bath and Wells, and then the Bishop of Bath and Wells sent the case direct by letters of request to the Court of Arches. The letters of request recited the proceedings before the Commissioners, and contained extracts from the works which were specified. The citation or decree which was served upon the defendant followed the letters of request, and cited him to answer for the heresies contained in those works, which heresies were in substance these: (1) The actual presence of Our Lord in the Sacrament of the Lord's Supper; (2) The visible presence of Our Lord upon the altar or table of the Holy Communion; (3) That there is a sacrifice at the time of the celebration of the Eucharist; (4) That adoration or worship is due to the consecrated elements of the Lord's Supper. The articles as now offered for admission further charged the defendant with contravening the 29th Article of Religion by holding heretical doctrine as to the 'reception of the Eucharist by the wicked,' which heresy, it was alleged, was contained in a certain other work, viz. 'An Examination of Archdeacon Denison's Propositions of Faith,' published by him. This work was not laid before the Commissioners, nor was it specified in the letters of request or citation.

A. J. Stephens (with him *Dr. Tristram*, *Archibald*, and *B. Shaw*), on behalf of the promoter, moved the admission of the articles on October 26, and the Court took time to consider its judgment

Sir R. J. PHILLIMORE delivered judgment on Saturday, October 30. He held that the jurisdiction of the Court in the case was founded upon and limited by the charges laid before the Commissioners, and that he had no authority to deal with any charges which were not laid before them. It was, moreover, a clear axiom of the law and practice of the Court that no charges could be laid in criminal articles against a defendant of which he was not apprised by the citation or decree which summoned him to appear before the Court. The passages in the articles which charged the defendant with maintaining the doctrine that 'The wicked eat the body of Christ in the use of the Lord's Supper,' contained, he held, a charge of a distinct and separate offence; for it was clear that the doctrine of the Real Presence might be holden, and had been holden, by those who denied the reception of the Eucharist by the wicked. This charge had not been preferred before the Commissioners, nor was it specified in the letters of request, or the decree embodying them which was served upon the defendant, and the articles should therefore be reformed by striking out all the passages relating to it.

Leave to appeal was granted.

Court of Arches.
Nov. 19.
} THE BISHOP OF WINCHESTER *v.* WIX.

*The Office of the Judge voluntarily Promoted by the Bishop of the Diocese—Resignation of Bishop—*32 *&* 33 *Vict. c.* 111*—Suit not Abated—Alteration of Title—Practice.*

This was a cause or business of the office of the judge, promoted by the Bishop of Winchester against the Reverend R. H. E. Wix, M.A., a clerk in holy orders, vicar of the ecclesiastical parish of St. Michael and All Angels, Swanmore, in the Isle of Wight, in the county of Southampton and diocese of Winchester, for having offended against the laws ecclesiastical, as contained in the letters of request.

The case was voluntarily promoted by the bishop, who gave the usual bond for costs. The defendant appeared. After the articles had been brought in and admitted, and before the defendant had filed his responsive plea, the Bishop of Winchester resigned his see, under the provisions of the 32 & 33 Vict. c. 111, and the see was declared vacant by order in Council on Nov. 11, 1869.

The matter now came before the Court on act on petition, in which the defendant submitted that the suit had abated by reason of the resignation of the bishop, and prayed to be dismissed from further observance of justice therein. The promoter, in his answer, denied that the suit had abated by reason of such resignation, and prayed to have the title of the cause amended by describing the promoter as the Right Rev. Charles Richard Sumner, D.D., late Lord Bishop of Winchester.'

Dr. Deane (with him *Dr. Tristram*) for the promoter.
A. Charles for the defendant.

Sir R. J. PHILLIMORE held that the suit had not abated by reason of the resignation of the bishop, the voluntary promoter, and ordered the title of the cause to be amended as prayed. Question as to costs reserved.

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Courts of Equity.

LORD HATHERLEY, L.C. and GIFFARD, L.J., Nov. 18, 22, 23, 24. } PIKE *v.* NICHOLAS.

Copyright—Piracy—Injunction.

This was an appeal from JAMES, V.C. (*ante*, 134). In the Court below the plaintiff and the defendant, the present appellant, had been represented by counsel, but on the appeal both conducted their cases in person.

The LORD CHANCELLOR thought that in three instances only had the defendant plagiarised positively from the plaintiff. In other cases the defendant had apparently been often put upon the right track in consequence of the plaintiff's essay; but in concluding that wherever there was a resemblance between the two publications in respect of authorities cited or theories sketched out, the defendant must be guilty of piracy from the plaintiff, the VICE-CHANCELLOR had not allowed enough for the fact that from the nature of the subject on which both parties had to write, they necessarily had a common plan and authorities. The defendant, however, had acted very improperly in denying by his answer all obligation to the essay of the plaintiff, who was in consequence entitled to assume him to be a person of no credibility, and had been put accordingly to great trouble in scrutinising his statements. There would therefore be no costs. The bill would be simply dismissed.

GIFFARD, L.J., agreed. The defendant had plagiarised on two occasions directly; but considering that he and the plaintiff, necessarily from the circumstances of the prize competition which occasioned both essays, had each to traverse one common field of history, with the object of arriving at one common conclusion, his LORDSHIP could not lay much stress on other resemblances. The defendant had clearly expended a certain amount of labour on his work, and the amount borrowed from the plaintiff was not by itself enough ground for an injunction. On the other hand, the defendant's answer contained allegations which were disingenuous and even untrue. His LORDSHIP rejoiced that the Court's opinion of such misconduct could be signified by refusing the defendant his costs.

MALINS, V.C. Nov. 20. } DUNN *v.* FERRIOR.

Production of Documents—Ejectment Bill.

Summons by plaintiff for production of documents, which defendant admitted he possessed. Defendant objected, on the ground that they related to his own title to the land, the subject-matter of the suit. Defendant was in possession, as heir-at-law, of the deceased intestate; plaintiff charged that his only possession consisted in having granted certain leases, which he alleged were collusively granted, as they would show on their face when produced. A motion for receiver had already been refused on appeal.

Mr. Schomberg and *Mr. Everitt* for the adjourned summons.

Mr. Osborne and *Mr. Bevir*, for the defendant, were not called upon.

MALINS, V.C., said that, where there could evidently be no relief given on the bill, as in this case on a mere ejectment bill, he would not order production of documents. Any person who chose might impeach the legal title of a man in possession, but he must do so by his proper legal remedy—an action of ejectment—and this Court could give him no assistance. Summons dismissed; no costs.

MALINS, V.C. Nov. 25. } KENRICK *v.* WOOD.

Married Woman—Next Friend—Authority to File Bill.

Bill by a married woman in New Zealand by her next friend, a solicitor, for the administration of an estate in which she was one of the residuary legatees. This was a motion by the same married woman by another next friend that all proceedings in the suit be stayed, and the first next friend be ordered to pay the costs, he having acted without her authority or knowledge. The respondent set up a general power of attorney from the married woman and her husband jointly as his authority.

Mr. Glasse and *Mr. Dauney* for the motion.

Mr. Cotton and *Mr. Bradford* against it.

Mr. G. Hastings for the executors.

MALINS, V.C., said the suit having been shown to be wholly unnecessary, it would not be covered by the general power of attorney (which, though expressed to be joint, was in fact only the husband's), but required a special authority. The next friend must pay the costs of all parties, including the costs of the motion.

MALINS, V.C. Nov. 25. } CHARRAS *v.* PICKERING.

Practice—General Order XXXIII. Rule 10—*Security for Costs—Dismissal of Bill.*

This bill was filed on January 15, 1869, and on the 21st an order was made that the plaintiffs, being out of the jurisdiction, should give security for costs. No security having yet been given,

Mr. W. C. Renshaw now moved that the plaintiffs be ordered to give security for costs within fourteen days, or the bill to stand dismissed without any further order. He cited *Kennedy* v. *Edwards*, 11 Jur. (N.S.) 153 for the form of the order.

MALINS, V.C., made the order.

MALINS, V.C. Nov. 25. } GRECH *v.* ORAM.

Injunction—Stay of Action—Traverse of Plaintiff's Alleged Equity.

Motion to stay an action of ejectment for non-payment of arrears of ground rent and interest on a mortgage. The plaintiffs in the suit set up a parol agreement for capitalising the ground rent and interest, which they contended had been part performed. The defendants denied that the agreement affected the arrears, they having been expressly excepted therefrom.

Mr. Glasse and *Mr. Speed* for the motion.

Mr. Cotton and *Mr. Alexander* opposed.

MALINS, V.C., said that everything turned on the nature of this parol agreement, which the plaintiff alleged on the one hand as the foundation of his equity, and the defendant on the other hand denied upon oath. This was a point which could not be decided till the hearing of the cause, and he must therefore refuse the motion, reserving the costs till the hearing.

MALINS, V.C. Nov. 25. } JUSTICE *v.* PAYNE.

Motion by Undischarged Bankrupt Defendant—Costs.

Mr. Finlaison moved on behalf of the defendant Payne to enlarge the time of a proposed sale ordered by the Court.

Mr. Shapter, for the first mortgagee on the property, took a preliminary objection that Payne had become bankrupt since the commencement of the suit, and that his assignee had been made a party. Payne had not yet received his discharge.

MALINS, V.C., refused the motion, with costs to be paid personally by Payne's solicitor.

JAMES, V.C. Nov. 23. } GRIFFIN *v.* BRADY.

Compromise—Costs—Foreign Jurisdiction—Order against Absent Person—Compensation in Lieu of Costs.

The defendant was a solicitor, who claimed to have a lien for moneys due to him on certain deeds which had come into his possession, not in his professional capacity, but in that of a bare trustee for the plaintiff, and refused either to deliver them up or to convey the legal estate in the property to which they related. The property being situate in Scotland, the plaintiff applied to the Court of Session for an order in the nature of a vesting order under the Trustee Acts; and such order was made, according to what appeared to be the Scotch practice, without either actual or substituted service of the petition on the plaintiff. At the same time the above-named suit was instituted in England for recovery of the deeds. This suit was eventually compromised on terms which amounted to a surrender by the defendant, with one trifling exception, of all the points in dispute; but nothing having been said about costs already incurred, the suit was brought to a hearing by the plaintiff in order to enforce payment of them.

Mr. Kay and *Mr. Renshaw* for the plaintiff.

Mr. Amphlett and *Mr. Cracknall* for the defendant.

JAMES, V.C., held that the plaintiff had not, by accepting a compromise which was substantially a submission, lost her right to costs; and as to the Scotch costs, though he could not have enforced an order of a foreign Court made against an absent person without notice, he could treat them as expenses forced upon the plaintiff by the perversity of the defendant, and order compensation accordingly, with a reference to Chambers, if the parties were not satisfied with the amount fixed by the Scotch Court. The defendant to pay the costs of the suit.

JAMES, V.C. Nov. 20, 23. } *In re* THE FAMILY ENDOWMENT SOCIETY. *Ex parte* POTTS.

Winding-up—Disputed Debt—Amalgamated Companies—Novatio.

This was a petition for winding-up the above-named society, which, like many others, had been amalgamated with the Albert Life Assurance Company. The petitioner claimed to be a creditor in respect of the arrears on two annuities granted to him by the society.

The petition was resisted on the grounds (1) that the petitioner having had full notice of the transfer of the Family Endowment business to the Albert, and having through a series of years applied for and received payment at the latter's office, must be taken to have accepted a *novatio*; (2) that the former society had ceased

to exist in 1861, and therefore could not be wound-up under the Act of 1862; and (3) that at all events the Court had a discretion under that Act, which it would exercise in such a case as this by leaving the creditor to his remedy at law.

Mr. Fry and *Mr. Westlake* for the petitioner.

Sir R. Palmer, Mr. Higgins, Hon. Walter Bethell, Mr. Kay, Mr. Jackson, Mr. Eddis, and *Mr. Watson* appeared for different sets of shareholders in the Family Endowment who resisted the petition.

Mr. Amphlett and *Mr. Kekewich,* for the surviving directors, supported the petition, in order to protect themselves from an action at law.

Mr. Willcock and *Mr. Whitehorne* for the official liquidator of the Albert.

JAMES, V.C., held (1) that this was not like a change in a banker's firm, where slight circumstances might suffice to prove consent on the part of a creditor; cogent evidence would be required of his having agreed to accept what was in fact an entirely new position, whereas the receipts given to the Albert were no evidence at all, no more than if they had been indorsed on the instrument itself; (2) that the society had not, and indeed could not have, ceased to exist so as to prejudice its creditors; and (3) that to leave the creditor to bring an action against the surviving directors of the society, and then enforce his judgment by *sci. fa.* against any shareholders he could find, would not be fair either to him or to them. The order would therefore go *ex debitio justitiæ.*

Courts of Common Law.

Queen's Bench.
(Magistrate's Case.)
Nov. 25.

REGINA *v.* THE JUSTICES OF THE WEST RIDING OF YORKSHIRE.

The Wine and Beerhouse Act 1869 (32 & 33 *Vict. c.* 27) —9 *Geo. IV. c.* 61—*General Annual Licensing Meeting —Adjournment—Certificate—Time for Application.*

Rule calling upon the justices of the West Riding of Yorkshire to show cause why a mandamus should not issue, commanding them to enter continuances and hear an appeal by one Drake against the refusal of certain justices to grant him a certificate under the Wine and Beerhouse Act 1869, authorising him to receive a license for the sale of beer, &c.

On August 20, 1869, the justices held their general annual licensing meeting, when a person named Bewcock applied for a certificate for the house in question. He had given the proper notices required by 9 Geo. IV. c. 61, but the justices refused to grant him a certificate on the ground that he had been convicted of an offence against the tenour of his license when he was the occupier of another house. He continued to remain in the house until his license expired, not having appealed against the refusal to grant the certificate. On August 20 the justices adjourned the meeting till September 17, on which day Drake applied for a certificate in respect of the same house, he having given notice as required by section 17 of the Wine and Beerhouse Act 1869, twenty-one days before he made the application, though not twenty-one days before August 20. The justices refused the certificate, whereupon he appealed to the quarter sessions. The appeal was dismissed on the ground that the notice ought to have been given twenty-one days before the general annual meeting.

Waddy showed cause against the rule, contending that the justices having refused the certificate to Bewcock, it was not competent for Drake to make the application in respect of the same house, and, also, that reading the 9 Geo. IV. c. 61 with the Wine and Beerhouse Act 1869, the notices must be given twenty-one days before the general annual meeting was held.

Hannay, in support of the rule, contended that the notices were sufficient, and that the quarter sessions ought to have heard the appeal.

Per curiam (BLACKBURN, J., MELLOR, J., and LUSH, J.) —The refusal to grant the certificate to Bewcock was on the personal ground that his character was such as to disentitle him to the certificate, and not on the ground of the character or unfitness of the house. There was nothing to prevent Drake from applying for a certificate in respect of the same house, and the proper construction to put upon section 3 of 9 Geo. IV. c. 61, and upon section 7 of the Wine and Beerhouse Act 1869, is that the notices, if given twenty-one days before the day of holding the adjourned meeting, may be sufficient, although they were not given twenty-one days before the general annual licensing meeting. The quarter sessions must therefore hear the appeal.

Rule absolute.

Exchequer Chamber.
(Appeal from Q.B.)
Nov. 26.

SADLER *v.* SMITH.

Arbitration and Award—Boat Race—Jurisdiction of Referee—Stakeholder.

Appeal from the decision of the Court of Queen's Bench, reported 38 Law J. Rep. (N.S.) Q.B. 91. Kelly and Sadler, two watermen, had agreed to row a 'right-away sculler's race' upon the river Thames, the start to take place at half-past two P.M., the rowing to be according to the recognised rules of boat-racing, and a referee to be chosen at the last deposit, 'whose decision shall be final.' In watermen's races it is the practice for the men to start themselves. A referee was appointed and the race commenced, but a foul having taken place, the men were ordered by the referee to row over again. On the following day they came to the starting-place. After several fruitless attempts to start, Kelley rowed

up to the referee's steamboat, which had drifted out of sight of the men, and complained that Sadler would not start. The referee looked for Sadler, but not seeing him, told Kelley to inform Sadler that he must start, and that if he would not, to row over without him. Kelley then went away, and the referee afterwards saw him row over the course, but did not hear him speak to Sadler. The referee having decided that Kelley was entitled to the stakes, it was found by the jury, in an action against the stakeholder, that the referee's order was not communicated to Sadler, and that a fair opportunity of starting was not given to him. The Court of Queen's Bench, upon a rule to enter the verdict for the defendant, held that under the agreement of submission it was necessary, to empower the referee to award the stakes, that there should be a race or a start; and assuming that the referee had power in certain cases to direct one of the men to start without the other, yet as the terms of his order were not conveyed to Sadler there never had been a start, and that, therefore, there had been no case for the referee to adjudicate upon, and his decision was void. The defendant appealed from this decision.

Garth (*Tennant* with him) for the defendant.

Hawkins, *Henry James*, and *Brickwood* for the plaintiff.

The Court (Kelly, C.B., Willes, J., Channell, B., Keating, J., Pigott, B., and Cleasby, B.) affirmed the decision of the Queen's Bench upon the same grounds.

Judgment affirmed.

Exchequer. Nov. 19. } Mann *v.* Harbord and Another.

Practice—Costs—Provisional Entry of Cause—Appeal from Master to Judge.

The plaintiff, pursuant to an order made for facilitating the entry of causes for trial at Liverpool, entered the cause provisionally at the office of the prothonotary at Preston, before the commission day at Liverpool, for trial at the spring assizes at Liverpool. Afterwards an application was made to a master, by the defendants, for a commission to Bombay to examine witnesses. The master refused to make the order, and the defendants appealed to a judge, who made an order for the commission to issue, and also that the trial should be stayed till the summer assizes. He ordered that the costs of the commission should be borne by the defendants in case the evidence under the commission should be held irrelevant to the issue to be tried. He made no special order about the costs of the appeal.

On the return of the commission, the defendants withdrew their pleas.

On the ultimate taxation of the costs for the plaintiff, the master disallowed the costs of provisionally entering the cause at Preston, and also the costs of the appeal from the master to the judge.

A rule *nisi* having been obtained to review the taxation on these points,

H. W. Lord showed cause.

Herschell supported the rule.

The Court (Channell, B., Pigott, B., and Cleasby, B.) said that the plaintiff was entitled to the costs of provisionally entering the cause, that having been a legitimate step for him to take; but that as to the costs of an appeal from the master to the judge, they would not be costs in the cause for the party ultimately successful, unless the judge specially directed them to be so, and therefore the master was right in disallowing them.

Rule absolute to review the taxation as to the costs of provisionally entering the cause.

Probate and Matrimonial Causes.

Probate. Nov. 23. } *In the goods of* E. L. Cooper.

Will—Executor a Bankrupt and Resident Abroad—Grant to Legatee under s. 73 of Probate Act.

Elvira Louisa Cooper, late of Bernard Street, in the county of Middlesex, spinster, deceased, died in August 1869, having made her last will and testament dated July 22, 1865, whereof she appointed John Johnson sole executor. By it she bequeathed the sum of 100*l.* to her mother; and all other moneys of which she might be possessed at the time of her decease, after payment of funeral and testamentary expenses, she gave in equal shares to her sisters Rosina Mary Cooper, Henrietta Sophia Reakes (wife of Reakes), Elizabeth Harriett Cooper, and Alice Grace Cooper; and to the said Alice Grace Cooper she further bequeathed all her 'wearing apparel, books, plate, jewels, pictures, and household furniture.' The value of the personal estate was under 300*l.* Johnson was adjudicated a bankrupt on his own petition in December 1868, and in January 1869 he left England for Australia, where he is now believed to be living.

Searle moved the Court to decree letters of administration, with the will annexed, to Alice Grace Cooper as residuary legatee under section 73 of the Probate Act.

Lord Penzance: The language of the will would not carry leasehold. It is not necessary, however, to make out that the applicant is residuary legatee. I can make the grant to anybody under section 73; but before it will issue as prayed, you must bring in the written consent of the mother and the other legatees named in the will.

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Present: Lord CHELMSFORD, Sir J. COLVILE, and Sir J. NAPIER.

Victoria House of Assembly, Powers of—Commitment—Special Leave to Appeal.

This was a petition by Sir Francis Murphy, the Speaker of the Legislative Assembly of the Colony of Victoria, praying for special leave to appeal from a judgment of the Supreme Court of the Colony of Victoria.

The petition stated that by 18 & 19 Vict. c. 55, the Constitution Act of Victoria, it was enacted:—'That it shall be lawful for the Legislature of Victoria by any Act or Acts to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Council and Assembly, and by the members thereof respectively provided that no such privileges, immunities, or powers shall exceed those now held, enjoyed, and exercised by the Commons House of Parliament or the members thereof.' That the Legislature of Victoria did by Act No. 1 enact:—'The Legislative Council and Legislative Assembly of Victoria respectively, and the committees and members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as, and the privileges, immunities, and powers of the said Council and Assembly respectively, and of the committees and members thereof respectively, are hereby defined to be the same as at the time of the passing of the said recited Act were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland and by the committees and members

thereof so far as the same are not inconsistent with the said recited Act, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.' That on March 11, 1869, the Legislative Assembly of the Colony of Victoria, constituted under the powers of said first mentioned Act, sitting at the Parliament House in the City of Melbourne and Colony of Victoria, being the place duly appointed by the Governor of the said Colony for the sitting of the Legislative Council and Legislative Assembly of the said Colony, did resolve:—'That certain statements of certain members in relation to certain charges made public on the occasion of a trial in the Supreme Court, so far as they related to the conduct and character of members of the House, should be referred to a Select Committee for Enquiry. That such committee met on several occasions and examined witnesses, and reported to said Assembly. That the said Legislative Assembly also resolved and determined, 'that in the opinion of the House Hugh Glass and John Quarterman are guilty of a contempt and breach of the privileges of this House, that they be taken into custody of the serjeant-at-arms, in order that they may be brought to the bar of this House to-morrow, and that Mr. Speaker do issue his warrant accordingly.' That the petitioner, as such speaker, in pursuance and execution of the said resolution and determination, made and issued his warrant, requiring the said serjeant-at-arms to take the said Hugh Glass and John Quarterman into his custody, and bring them to the bar of the said Legislative Assembly; and the said warrant was delivered to the said serjeant-at-arms. That by virtue of such warrant such serjeant-at-arms arrested the said Hugh Glass and John Quarterman. That on April 28, 1869, the said Hugh Glass and John Quarterman were brought to the bar of the said Legislative Assembly. That the petitioner, as such speaker as aforesaid, then issued his warrant for the detention of the said Hugh Glass and John Quarterman. That afterwards on April 29, 1869, the said Legislative Assembly resolved and determined, 'that Hugh Glass and John Quarterman having been guilty of a contempt and breach of the privileges of the House, be for their said offence committed to Her Majesty's gaol at Melbourne, and that Mr. Speaker do issue his warrant accordingly.' Whereupon the petitioner, as such speaker, made and issued his warrant under his hand accordingly. That thereupon, and upon receiving the warrant, the serjeant-at-arms proceeded forthwith to take into custody the said Hugh Glass and John Quarterman, and conveyed them to Her Majesty's gaol at Melbourne, and delivered them to the keeper of the said gaol.

That on April 30, 1869, a writ of *habeas corpus* was obtained by the said Hugh Glass, directed to the keeper of Her Majesty's gaol at Melbourne, requiring him to have the body of the said Hugh Glass at the Court House. That counsel for the said Hugh Glass appeared on May 1, 1869, and applied for his discharge from custody; and after hearing arguments from said counsel, and counsel to uphold the return, the said Chief Justice gave judgment that the said Hugh Glass ought to be discharged from custody. That an application was made on June 21, 1869, to the Supreme Court of the Colony of Victoria for a rule *nisi* to set aside the order of the Chief Justice made on the hearing of the *habeas corpus* obtained by the said Hugh Glass. That such rule *nisi* came on to be heard on June 26, 1869, when same was discharged.

Sir R. Palmer and *Mr. Wood* submitted that under the provisions of the Acts hereinbefore referred to, and the privileges, powers, and immunities thereby conferred on the said Legislative Assembly of Victoria, the warrants were respectively valid, and the order of the Chief Justice discharging the said Hugh Glass from custody was erroneous.

Their Lordships were of opinion that the petitioner ought to have special leave to appeal, and leave to appeal was accordingly granted.

Courts of Equity.

Giffard, L.J. } *In re* Barned's Banking Company.
Dec. 2. } Coupland's Claim.

Company—Proof of Debt—Security—Guarantee.

This was an appeal from the decision of the Master of the Rolls, reported 38 Law J. Rep. (N.S.) Chanc. 575.

Mr. Jessel and *Mr. Westlake* for the appellants, Messrs. Coupland.

Sir R. Baggallay and *Mr. Kekewich* for the respondent, the official liquidator, were not called upon.

His Lordship dismissed the appeal with costs.

Giffard, L.J. } *In re* Trick's Trusts.
Dec. 2. }

Practice—Costs—Trustee Relief Act.

This was an appeal from an order of Stuart, V.C.

The trustee of a will was also residuary legatee. A question of the construction of the will as relating to the rights of certain parties to certain pecuniary legacies having arisen, the trustee paid the amount of the legacies into Court under the Act.

His Honour, upon a petition of the persons interested in the legacy, after deciding the question of the construction and other matters, ordered the trustee to pay

the costs as between solicitor and client out of the residue, which it was admitted was ample.

Upon the appeal his Lordship held that the jurisdiction to order the trustee to pay costs could only extend to make him pay costs as between party and party, and varied his Honour's order to that extent.

Mr. Dickenson and *Mr. Freeling* were for the appellant; and

Mr. Karslake and *Mr. C. Hall* for the respondent.

Giffard, L.J. } *Re* Brookman's Trusts. The
Nov. 20, Dec. 3, 4. } Same *ex parte* Smith.

Marriage Articles—Covenant to Give by Will—Death of Object of Covenant after attaining Absolute Interest in the Lifetime of Covenantor.

This was an appeal from a decision of Malins, V.C., a short note of which will be found *antè*, p. 149. The case is fully reported in 38 Law J. Rep. (N.S.) Chanc. 585, and the question was whether, where the object of a covenant to leave property by will had died in the lifetime of the covenantor, his representatives were entitled to the benefit of the covenant. The Vice-Chancellor was of opinion that the object of the covenant had acquired an absolute interest thereunder which would not lapse, as in the case of a legacy, by his death in the lifetime of the covenantor, and made a declaration accordingly. Hence the appeal.

Mr. Hardy and *Mr. Everitt*, *Sir Roundell Palmer* and *Mr. Speed* appeared for the appellants.

Mr. Glasse and *Mr. Jason Smith* for the respondents.

Giffard, L.J., without hearing a reply, reversed the decision.

Lord Hatherley, Q.C., and Giffard, L.J. Nov. 5, 8, 9; Dec. 9. } Topham *v.* Duke of Portland.

Power of Appointment—Fraud on Power—Improper Influence—Second Appointment—Continuance of Old Influence.

This was an appeal from a decree of James, V.C. (reported *antè*, p. 170, and 38 Law J. Rep. (N.S.) Chanc. p. 513), whereby his Honour had declared that two appointments made by the Duke of Portland in favour of his sister Lady Harriett Bentinck were void. From this decision Lady Harriett and the Duke appealed.

Mr. Amphlett, *Sir R. Baggallay*, *Mr. T. Stevens*, *Mr. A. Bailey*, and *Mr. M. B. Smith* for the appellants.

Sir R. Palmer, *Mr. C. Hall*, and *Mr. Rowcliffe* for the plaintiff, and

Mr. Jessel, *Mr. Kay*, *Mr. Morris*, and *Mr. Bethell* for other parties.

Their Lordships dismissed the appeal with costs.

Lord Romilly, M.R. Nov. 20, Dec. 4. } *Re* Jones.

Solicitors' Act, 6 & 7 *Vict. c.* 73, *s.* 26—*Taxation of Costs —Uncertificated Solicitor.*

This was a summons to review the taxation of a solicitor's bill. Owing to an accident the solicitor had not taken out his certificate for three months. The taxing master had disallowed the items charged during those three months. The bill had been taxed at the instance of the client.

Mr. Jessel and *Mr. Bevir* for the applicant.

Mr. Southgate and *Mr. Begg* contra.

Dec. 4.—The Master of the Rolls said the Act took away the remedy of a solicitor in respect of costs due to him for work done while uncertificated, but did not destroy the debt. As the taxation was at the instance of the client it was not a proceeding for the recovery of costs; they ought therefore to have been allowed. He did not express any opinion as to what would have been proper if the taxation had been at the instance of the solicitor.

Malins, V.C. Dec. 5. } Hall *v.* Woolley.

Will—Construction—Re Potter's Trust followed.

A will contained a gift of property to the defendant upon trust to pay the income to the testator's wife during her widowhood, and afterwards to hold the property in trust for all the children of the testator's sisters, or late sisters, in the will named who should be living at the death or second marriage of his wife, and the issue of such of the said children as should be then dead, yet so that such issue should only participate as representing their parents.

The plaintiffs were three grandchildren of one of the sisters named, being children of her daughter, Martha Hall, who, as the testator well knew, was dead at the date of the will.

The bill was a friendly one filed against the trustees to ascertain the rights of the plaintiffs. The trustees demurred.

Mr. Cotton and *Mr. F. F. White* for the demurrer.

Mr. Prendergast and *Mr. Jolliffe*, for the bill, were not called upon.

Malins, V.C., overruled the demurrer, considering the case to be governed by *Re Potter's Trust* (Notes of Cases, 1869, p. 67), when he had considered all the cases on the subject, and rejected the authority of *Christopherson* v. *Naylor*, 1 Mer. 320.

Malins, V.C. Dec. 6, 7, 8. } Wheatley *v.* The Westminster Brymbo Coal and Coke Company (Limited).

Lease—Mines—Specific Performance of Covenant to Work.

The principal points in this suit were as follows:—

The plaintiffs had demised to the defendants coal mines with the usual reservation of royalties, and a minimum fine-rent or dead-rent in lieu of royalties. The lease contained a covenant by the defendants to work the mines 'uninterruptedly, efficiently, and regularly, according to the best and most approved mode.'

The case made by the plaintiffs was that that covenant had been broken; that the defendants had taken the mine merely for the purpose of keeping the coal out of the market; that their working was merely illusory; that during the seven years which had elapsed since the date of the lease the royalties had never once come up to the dead-rent, and that the defendants intended to go on in the same way, never paying more than the dead-rent. They asked that it might be decreed that the defendants were bound to work 'uninterruptedly, &c.' according to the terms of the covenant, and for an injunction to restrain them from working otherwise. They also asked for a reference to Chambers to ascertain what damage had

been sustained by the plaintiffs by reason of the previous default of the defendants, and to ascertain what would be a proper mode of working according to the terms of the covenant.

The defendants admitted that the dead-rent had hitherto always exceeded the royalties, but denied all the other statements of the plaintiffs; but the VICE-CHANCELLOR considered that the broad question was raised whether, under a covenant such as above-stated, lessors of mines had any remedy in this Court, or at all, against lessees who paid the dead-rent fixed by their lease, and refused to work the mines.

Mr. Glasse and *Mr. Nalder* for the plaintiffs.

Mr. Cotton and *Mr. Freeling* for the defendants.

MALINS, V.C., dismissed the bill on the ground that the Court could not give the relief asked for without undertaking the management of the mines, which it could not do; and that the plaintiffs' remedy, if any, was at law. He considered that the bill was merely one to compel the defendants to pay the plaintiffs a larger rent, and that, there being nothing to indicate how much ought to satisfy the plaintiffs, they could not compel the defendants to do more than pay the dead-rent if the latter chose not to work so as to produce more by way of royalty.

JAMES, V.C. Dec. 2. *In re* THE BANK OF LONDON AND NATIONAL PROVINCIAL INSURANCE ASSOCIATION.

Company—Winding-up—Business of Company transferred to another Company—Practice—Service of Petition.

Mr. Montagu Cookson applied to the Court for directions as to the service of a petition for winding-up the above company, which, about the year 1858, had transferred its business to and become merged in the Albert Insurance Company, now in course of liquidation.

The petitioner, who was the assignee of a policy effected with the above-named company before the transfer of its business to the Albert Company, had, in spite of all his endeavours, failed to discover the names and addresses of any of the directors of the old company; but he had found three shareholders in that company, upon whom, as representing the interests of the company, he proposed to serve the petition: otherwise he asked to be allowed to serve it upon the official liquidator of the Albert Company at the office of that company.

JAMES, V.C., directed that the petition should be served upon the three shareholders, and also upon the official liquidator of the Albert Company at the office of the Albert Company.

JAMES, V.C. Dec. 2. PRICE *v.* RICKARDS.

Practice—Motion to Dismiss for Want of Prosecution—Assignment by Plaintiff to Trustees for the Benefit of Creditors—Abatement—Section 197 of Bankruptcy Act 1861.

Motion on behalf of the defendants that the plaintiff's bill might be dismissed for want of prosecution. The suit, which was instituted in September 1868, was a vendor's suit for the specific performance of an agreement for the purchase of certain mining leases. In September 1869 the plaintiff executed a deed of assignment, under section 192 of the Bankruptcy Act 1861, for the benefit of his creditors, which was duly registered. In November the defendants, who knew of the execution and registration of this deed, gave notice of motion to dismiss the bill for want of prosecution. In their affidavit in support of the motion they referred to the deed of assignment.

Mr. Amphlett and *Mr. Deere Salmon* now moved in pursuance of such notice, and relied upon *Pickering* v. *The Capetown Railway*, L. R. 7 Eq. 224.

Mr. Decimus Sturges, for the plaintiff, admitted that the motion was proper in point of time, but he relied on section 197 of the Bankruptcy Act 1861 to show that the execution of the deed of assignment (the validity of which in this case was undisputed) caused an abatement of the suit.

JAMES, V.C., said he must refuse the motion. In the case cited the effect of section 197 of the Bankruptcy Act 1861 had not been called to his attention; but since this motion had been made on the authority of that case he would make no order as to the costs of the motion.

JAMES, V.C. Dec. 4. *Re* ASHMORE'S TRUSTS.

Will—Construction—Vesting—Allowance for Maintenance.

Elizabeth Ashmore by her will gave all her residuary estate to trustees upon trust to pay the income to her daughter, Mary Ann Hopkins, for her life, for her separate use, and subject thereto to assign and transfer such residuary estate unto and amongst such of her four grandchildren therein named as should be living at the decease of her said daughter, and as should not have assigned or incumbered his, her, or their share or interest, or expectant share or interest, and as should then have attained, or should thereafter live to attain the age of twenty-one years, and in the meantime to apply the dividends, &c., of the share or shares of such of them as should be under twenty-one, or so much thereof as might be necessary in or towards his, her, or their maintenance and education; and the will also contained the following proviso:—'In case any of my said four grandchildren shall die in the lifetime of my said daughter leaving lawful issue them, him, or her surviving, the share or shares of such of them so dying shall be assigned and transferred to such issue respectively in equal shares and proportions on their attaining the age of twenty-one years, and the dividends and proceeds thereof in the meantime to be applied in or towards their maintenance and education.' The testatrix died in 1850, and her daughter in 1859. Elizabeth Andrews, one of the grandchildren, died before the period of distribution, having had issue four children, of whom one died in her mother's lifetime, and two others survived their mother, but died under age before the period of distribution. The fourth child was the petitioner, who attained twenty-one on July 2, 1869, and now claimed the whole of his mother's share.

Mr. Hardy and *Mr. Byrne* for the petitioner.

Mr. Everitt, for the father and administrator of the two children who survived their mother, but died under twenty-one, contended that the provision for their maintenance out of the income proved an intention that they should take an immediate vested interest on the death of their mother.

JAMES, V.C., could not distinguish the case from

Pulsford v. *Hunter*, 3 B. C. C. 416, the income being given as an entire fund to an entire class, for maintenance only.

Order as prayed.

James, V.C. } Finney *v.* Godfrey.
Dec. 8.

Practice—Exceptions to Bill for Scandal—Right of One Defendant to Except for Scandal in an Allegation against a Co-Defendant.

The bill was filed against Godfrey, M'Craw, and Turner, to restrain Godfrey from prosecuting an action on, or from negociating a certain bill of exchange for 600*l.*, on which the plaintiff was liable as indorser. The bill charged collusion between Godfrey, M'Craw, and Turner for the purpose of defrauding the plaintiff in respect of the said bill of exchange, and alleged that 'the defendant M'Craw in particular, to the knowledge of the defendant Godfrey, had been mixed up with several irregular transactions in connection with bills of exchange.' M'Craw had not appeared to the bill, and it was stated he was keeping out of the way. Godfrey excepted to the above passage for scandal.

Mr. Kay and *Mr. Horsey*, for the exceptions, argued that wherever a passage was scandalous, it would be expunged by the Court from its records, and a person not personally affected by the scandal might move the Court to do so.

Mr. Graham Hastings, for the bill, urged that the statement was not impertinent, and therefore not scandalous. The character of the persons charged with the collusion was of course material, and this could not be proved at the hearing unless it was put in issue by the bill. He was stopped by the Court.

James, V.C., said, so far as it was the duty of the Court to strike out scandalous matter from the pleadings, he would not allow Godfrey to point out the duties of the Court. To support exceptions to a bill by a defendant, he must show personal injury. Here no moral turpitude was charged against Godfrey, and the exceptions must be overruled, with costs.

Courts of Common Law.

Bail Court. } Harland *v.* Mayor, &c. of Newcastle.
Nov. 24.

*Costs—Arbitration—*30 *&* 31 *Vict. c.* 142, *s.* 5.

Coram Hannen, J.

Crompton on a former day had obtained a rule calling upon the defendant to show cause why the plaintiff should not be allowed the costs of the action, or why the award should not be sent back to the arbitrator to certify for the costs of the action.

The action was brought in the Court of Queen's Bench for trespassing on plaintiff's close. The defendant denied the plaintiff's title to the *locus in quo*, and justified under a local Act. The cause and all matters in difference were referred by consent before trial to an arbitrator, who was to have all the powers of a judge at Nisi Prius as to certifying, and the costs of the reference were to be in his discretion. The arbitrator found that the alleged entry was justified under the local Act, but in respect of a certain excess in the exercise of the defendant's powers the arbitrator awarded the plaintiff 2*l.* 14*s.* The costs of the reference were disposed of in the award, but no mention was made of the costs of the action, and no certificate was given. The defendant took up the award. The plaintiff subsequently applied to the arbitrator for a certificate to give him the costs of the action. The arbitrator gave him a document which stated that it appeared to him that there was a sufficient reason for bringing the action in the Court of Queen's Bench. The plaintiff took out a summons to tax his costs, which was dismissed by the Master. This rule was obtained under 30 & 31 Vict. c. 142, s. 5, which enacts that a plaintiff who recovers a sum not exceeding 10*l.* in *tort* shall not be entitled to any costs unless the judge certify on the record that there was sufficient ground for bringing such action in such Superior Court, or unless the Court, or a judge at Chambers, shall, by rule or order, allow such costs.

Herschell now showed cause.

Crompton supported the rule.

Held, that the Court had power to certify for the costs, but that it would not act in the present case upon the bare statement of the arbitrator to the one party after the award had been made, without any other materials to guide the exercise of its discretion, and therefore remitted the case back to the arbitrator to give him the opportunity of certifying for the costs of the action if he thought fit.

Rule absolute to remit award.

Bail Court. } Regina *v.* Justices of Surrey.
Nov. 25.

Appeal by Implication—Highway Act (27 *&* 28 *Vict. c.* 101), *s.* 21—'*Like Proceedings.*'

Coram Hannen, J.

Rule for a mandamus to the justices of Surrey to enter continuances, and to hear an appeal against an order of two justices, made upon the application of the district surveyor by the direction of a highway board,

by which the justices directed a certain highway to cease to be a highway which the parish in which it was situate was liable to repair.

By 27 & 28 Vict. c. 101, s. 21, upon the application to the justices to view the highway with respect to which the order is sought, 'the like proceedings' are to be had as when application is made under the Highway Act 1835 to procure the stopping up of a highway. The Highway Act 1835, by section 88, gave an appeal to Quarter Sessions from such an order. The question was whether an appeal lay to the Quarter Sessions from an order directing a highway to cease to be a highway.

Robinson (*Serjeant*) and *Thesiger* showed cause.

Garth and *Gates* supported the rule.

Held that the appeal lay to the Quarter Sessions.

Rule absolute.

Probate and Matrimonial Causes.

Divorce and Matrimonial Causes. Nov. 23. } MILLER *v.* MILLER.

Husband's Suit for Restitution—Recriminatory Charges by Wife Abandoned at Trial—Wife Possessed of Separate Property—Wife Condemned in Costs—20 & 21 Vict. c. 85, s. 51.

This was originally a suit promoted by the husband for restitution of conjugal rights. The wife in her answer recriminated cruelty; but at the trial, which took place on July 14, 1849, before the Judge-Ordinary and a special jury, counsel for the respondent admitted that he had no case. The Court decreed restitution of conjugal rights, and reserved the question of costs. The respondent has ever since lived abroad, and avoided service of the decree. She had separate property to the amount of 760*l.* a year. The petitioner in his affidavit alleged that he had been induced by her to give up his practice as a surgeon in the country and come to London, and that his means of livelihood were now slender and precarious, and wholly insufficient to enable him to bear the costs of the needless and expensive litigation which she had entailed upon him.

Dr. Spinks (with him *Dr. Tristram*), moved the Court to condemn the respondent in the costs of the suit.

Dr. Deane (with him *E. Browning*) for the respondent, *contra*.

Lord PENZANCE: The legal question involved in the argument to-day is, first of all, whether the Court has power to make the order as prayed; and, secondly, if it has that power, whether it ought to exercise it? It cannot be doubted that it has the power, for the section (51) says in perfectly plain words that 'the Court in the hearing of any suit, proceeding, or petition under this Act, and the House of Lords on the hearing of any appeal under this Act, may make such order as to costs as to such Court or House respectively may seem just.' Then comes the question whether it ought ever to be exercised in the manner here prayed? I see no reason why it should not. I see no reason why, if a wife have private property, she should be entitled to put her husband to any amount of expense, and should then, however frivolous and vexatious her suit may have been, be allowed to retire from the Court free from any portion of the expense which she has so cast upon her husband. It is contrary to natural justice that she should be allowed to do so. The reason why she stands in a different position from other suitors is that the law presumes she has no property of her own. The law presumes that all the property is in the hands of the husband, and that the wife has none, and so no doubt the matter stood in former days, but now, under the auspices of Courts of Equity, the wife has achieved the power of holding very considerable separate property, and to the extent to which she has separate property the reason of the rule which makes her a privileged suitor ceases. There is no reason why, if she has separate property, she should not stand on the same footing as any other suitor; but in exercising the discretion vested in it in respect of costs, the Court will bear in mind certain other principles, one of them being that on which the House of Lords always acted, and which is referred to in *Carstairs* v. *Carstairs*, 3 Sw. & Tr. 538; s.c. 33 Law J. Rep. (N.S.) P. & M. 170. It was the rule of the House of Lords to see that before the husband got a divorce from his wife the wife should have some provision made for her maintenance, and in no case was it likely that the House would make an order on her for costs where the effect would be to absorb her means of livelihood. The Court must therefore look not only to the fact that the wife has separate property, but also to the amount of that property, before it will make an order upon her for costs. In this case the wife has considerable separate property. I do not know what the costs may be, but they cannot be very heavy, and I can have no hesitation in making an order upon her to pay them.

Divorce and Matrimonial Causes. Dec. 7. } KELLY *v.* KELLY.

Restraint of Wife by Husband—Injury to Wife's Health—Cruelty.

The wife petitioned for judicial separation on the ground of cruelty. The respondent denied the charge.

The case occupied the Court several days, and judgment was reserved.

Dr. Deane (with him *Inderwick*) for the petitioner.

The respondent opposed in person.

Lord PENZANCE now delivered judgment. Having detailed the circumstances under which the petitioner left her home in June 1868, and returned in October following, he proceeded to state the conduct thenceforth pursued towards her by the respondent, and which constituted the cruelty charged in the petition. In October she returned, and between that time and the January following, when she finally left home, she was purposely submitted to the following treatment:—she was entirely deposed from her natural position as mistress of her husband's house; she was debarred the use of money entirely; not only were the household expenses withdrawn from her control, but she was not permitted to disburse anything for her own necessary expenses. Every article of dress, every trifle that she required, had to be put down on paper, and her husband provided it if he thought proper. Having refused, on an occasion of going into the town, to tell her husband everywhere that she had been, an interdict was placed on her going out at will. At one time the doors were locked to keep her in; at another a man was deputed to follow her; at another the respondent insisted on accompanying her himself. On these occasions he appears to have occupied the short time they were together in what he called putting her sin before her in strong, coarse, and abusive terms, applying to her the same epithets and language as would be applicable to a woman who had been guilty of adultery. He took no meals with her; he occupied a separate bedroom; he passed no portion of the day, however small, in her society. They met as before only at family prayers, and if he spoke to her at all it was only to give some directions or to reproach her. Those whom she desired to see were forbidden the house. She was absolutely prohibited from writing any letters unless the husband saw them before they were posted. She was thus, as far as the respondent could achieve it, practically isolated from her friends. Meanwhile, the care of the household was confided to a woman hired for the purpose, who was directed not to obey Mrs. Kelly's orders without the directions of the respondent. In short, she was treated like a child or a lunatic, and in this light she was actually regarded by the woman just mentioned, when she first came to her place; and this, be it remembered, though she had arrived at the mature age of sixty, and had been married to the respondent for seven-and-twenty years. With no occupation—debarred the society of her husband and her son at home and that of her friends abroad—withheld from the performance of her household duties—subordinated to servants—penniless, and, so far as her husband could effect it, friendless—the daily life of this lady was little better than an imprisonment, the solitary silence of which was broken only by the language of harsh rebuke, foul words, and epithets of insult, indignity, and shame. What wonder that under so grievous an oppression her health at length gave way? She could not eat, she hardly slept at all, she was subject to constant trembling and fainting, she woke involuntarily screaming at night, and her nervous system was so shattered that the medical witnesses declared paralysis or even madness to be imminent. These, then, were the things which Mr. Kelly did, and these the results upon his wife's health. The remaining question is, why did he do them? His answer, I believe, would be, to bring his wife to penitence and submission. But penitence for what? and submission to what? Although he has never stated with clearness what it was that he wished her to do, it is, I think, to be sufficiently gathered from his letters that he desired her to admit that she had suspected him of fraud and had traitorously conspired with others to fasten that charge upon him. He then invokes the theory of the law—that the wife should be subject to the husband; but he forgets to add this qualification, 'in all things reasonable.' He asserts that he is within the law if refraining from physical violence—*i. e.*, only puts such pressure on his wife as shall force her to obey him. But again, he should add, 'provided the means used to exert moral pressure be reasonable.' But what if reasonable means are insufficient, and a wife still holds out against her husband's lawful will? The answer is that the law can neither do nor sanction more. The law no doubt recognises the husband as the ruler, protector, and guide of his wife; makes him master of her pecuniary resources; it gives him, within legal limits, the control of her person; it withdraws civil rights and remedies from her, save in his name. Conversely, the law places on the husband the duty of nourishing his wife, releases her from all civil responsibilities, and excuses her even in the commission of great crimes when acting under her husband's orders. By these incidental means it has fenced about and fostered the reasonable supremacy of the man in the institution of marriage. In so doing, it is thought by some that the law is acting in conformity with the dictates of nature. Be that as it may, the subordination of the wife is doubtless in conformity with the established habits and customs of mankind. With all these advantages, then, in his favour, the law leaves the husband, by his own conduct and bearing, to secure and retain in his wife the only submission which is worth having—that which is willingly and cheerfully rendered; and, if he fail, this Court cannot recognise his failure as a justification for a system of treatment by which he places his wife's permanent health in jeopardy, and sets at nought not only his own obligations in matrimony, but the very ends of matrimony itself, by rendering impossible the offices of domestic intercourse and the mutual duties of married life. The cruelty of the respondent is established, and the Court decrees a judicial separation, with costs.

High Court of Admiralty.

Admiralty Court. Nov. 23, Dec. 6. } THE EMPIRE OF PEACE.

Bottomry—Advances—Subsequent Bottomry Bond.

This was a cause of bottomry. The bond was dated June 14, 1866, when the Empire of Peace was lying at the port of Akyab, in British Burmah, bound to Queenstown for orders, and was executed by the master to secure the sum of 540*l.* odd (together with 30 per cent. maritime premium), advanced by Paul Henri Pierre Auschitzky. It appeared that at the time of the arrival of the Empire of Peace at Akyab Messrs. Auschitzky & Co., of which firm P. H. P. Auschitzky was a member, had agreed with Fernie Brothers, of Liverpool, the owners of the Empire of Peace, to supply the vessel with a cargo of rice at 6*l.* per ton, at a freight of 5*s.* a ton only, and that Auschitzky & Co. should hold the bills of lading as security for payment of their draughts on Fernie Brothers for the price of the rice, and for the amount of any disbursements they might make for the Empire of Peace. Auschitzky & Co., before any express agreement for bottomry was made, had advanced money for necessary disbursements for the ship; and on June 6, 1866, being informed that Fernie Brothers had stopped payment, thereupon refused to make any further advances without the security of a bottomry bond for past and future advances, and the bond was given accordingly.

Butt and *Clarkson*, for the plaintiffs, contended that Messrs. Auschitzky having already a lien upon the ship, it was competent for them to change their security, partly personal and partly on the freight, into a bottomry bond, and that by the law in force at Akyab the stores and some of the furniture of the ship might have been arrested for the advances.

Milward and *Cohen* for defendants. The advances were made partly on the security of a margin of freight, and partly on personal security; and it was not competent for the plaintiffs to change the security and take a bottomry bond.

The COURT pronounced against the bond with costs.

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Privy Council Cases.

Privy Council. Dec. 4. JOHN MARTIN (APPELLANT) *v.* THE REVEREND A. H. MACKONOCHIE (RESPONDENT).

Present: The LORD CHANCELLOR (Lord HATHERLEY), the Archbishop of YORK (Dr. THOMPSON), Lord CHELMSFORD, Sir J. COLVILE, and Sir J. NAPIER.

Judicial Committee—Monition—Disobedience to—Lighted Candles—Elevation of Cup and Paten—Kneeling.

This was a motion calling upon their LORDSHIPS to enforce a monition which had been served upon the respondent with regard to the execution of a sentence pronounced by the Court of Arches.

The sentence was extended and modified by the decision which the Judicial Committee were called upon to recommend as fit to be made by an order of Her Majesty in Council.

The order provided for several matters, as to three of which only it was alleged that there had been a breach by the respondent of the monition issued in pursuance of the order. Those three matters were—(1) that the respondent continued to elevate the cup and paten during the administration of the Holy Communion; (2) that he continued to kneel or prostrate himself before the consecrated elements during the prayer of consecration; (3) that he continued to use lighted candles on the communion table at times when such lighted candles were not wanted for the purpose of giving light.

It appeared from the affidavits that the candles had

not been lighted during the Holy Communion, for the course taken by the respondent had been that the candles were lighted and were kept burning up to the period of the Holy Communion, and then were, immediately before the commencement of the Holy Communion, extinguished. With reference to the elevation of the cup and paten during the administration of the Holy Communion, the respondent was ordered 'to abstain for the future from an elevation of the cup and paten during the ministration of the Holy Communion' to 'an extent 'above the head of the respondent.' It did not appear that the respondent had wilfully contravened this order. With reference to the charge of kneeling, it appeared from the affidavits made by the respondent and by a gentleman who was present on several occasions, that it was the practice of the respondent during the prayer of consecration when celebrating the Holy Communion, and whilst standing before the holy table, reverently to bend one knee at certain parts of the said prayer, and occasionally in so doing that his knee did momentarily touch the ground; and further that, having regard to the positions of the celebrating and assisting priests during the consecration prayer, as well as to the length and nature of their dress, it was not possible for any person in the body of the church to say whether the respondent did kneel or not.

The respondent made a further affidavit stating that he had never intentionally or advisedly disobeyed the monition.

Mr. A. J. Stephen, *Mr. Archibald*, and *Mr. Droop* appeared in support of the motion.

The respondent appeared in person.

The Lord Chancellor delivered the judgment of their Lordships:—1. With reference to the charge of using lighted candles at the celebration of the Holy Communion, their Lordships are of opinion that there has been a literal compliance with the monition. With reference to the charge of elevating the cup and paten, that, inasmuch as the monition must be construed by reference to the articles as pleaded in the Arches Court, and as those articles charged an elevation above the respondent's head, their Lordships are of opinion that an elevation is not proved sufficient to create a breach of the monition. With reference to the charge of kneeling during the prayer of consecration, it seems to their Lordships (and it is the opinion of us all) that there has been a clear breach of this special monition. Literal compliance with regard to the actual limits of the order is, of course, all that the respondent is held to in law. For an obedience to the spirit of the order, we can only trust to his own feelings and his own conscience, and when he tells us by his further affidavit that it has not been and is not his desire wilfully to disobey the law, or to disregard the monition, their Lordships think that they are bound, upon this first occasion of the matter being brought before them of any non-compliance with the order, to allow Mr. Mackonochie the benefit of that affidavit; and they do not think it necessary on the present occasion to do more, after expressing their opinion judicially that the monition has been disobeyed with reference to kneeling during the prayer of consecration, than to mark their disapprobation of such a course of proceeding by directing that he should pay the costs of the present application.

Courts of Equity.

Lord Hatherley, L.C.
Dec. 10.
} Maltby *v.* Ware.

Injunction—Ancient Lights—Acquiescence.

The Master of the Rolls had granted an injunction in this case (*antè*, 163) against the obstruction of the plaintiff's ancient light by a wall of forty feet high in the place of one considerably lower, opposite a taproom of the plaintiff's public-house; and he had also granted a mandatory injunction to compel the defendant to pull down the part, thirty-two feet high, which was already built. It appeared that the defendant had told the plaintiff that other alterations which were to be effected would have the effect of making his light on the whole as good as before, and that the plaintiff had intimated that if it were so he should not complain; but it was contended for the plaintiff that the improvements had not had this effect. Since the original order the plaintiff had offered to consent to the new buildings, if the defendant would procure a license for the plaintiff's landlord to open a new window in his taproom, and would open it at his own expense. But the offer had not been accepted in consequence of the landlord's refusal of the license. The defendant appealed.

Mr. Southgate and *Mr. Chitty* were for the appellant, and

Mr. Jessel and *Mr. Key* for the plaintiff.

The Lord Chancellor considered there had been a loss of light, and that the evidence did not show that the plaintiff had acquiesced in it. He also was of opinion that the plaintiff's offer to be satisfied by a new window being opened out for him showed that he was not litigating merely for the purpose of extorting money. The appeal must therefore be dismissed with costs.

Giffard, L.J.
Dec. 3.
} Bailey *v.* Hobson.

Tenants in Common—Right to Remove Crops contrary to Custom of the Country.

A decree for sale of a farm having been obtained in a partition suit, one of the defendants, who was in sole possession, advertised a sale of crops to be taken off the

land contrary to the custom of the country. Upon the application of the plaintiff, STUART, V.C., granted an injunction to restrain him from doing so.

The defendant appealed.

Mr. Phear for the appellant: There is no jurisdiction to make such an order in a partition suit. The custom of the country only applies as between landlord and tenant.

Mr. Dickinson and *Mr. G. Williamson*, for the respondent, contended that the removal of the crops was a destruction of the property which the Court would interfere to prevent.

Without hearing a reply,

GIFFARD, L.J., dissolved the injunction.

GIFFARD, L.J. Dec. 10. — *Re* THE SCHEME OF ARRANGEMENT OF THE POTTERIES, SHREWSBURY, AND NORTH WALES RAILWAY CO. *Ex parte* MINOR.

Railway Companies Act 1867—30 & 31 *Vict. c.* 127—*Scheme of Arrangement—Execution by Judgment Creditor—Injunction.*

The question which arose in this case was as to the right of a debenture-holder of the company, who had recovered judgment for the amount of his debenture, to issue execution notwithstanding the enrolment of a scheme of arrangement under 30 & 31 Vict. c. 127.

Mr. Minor, who was a debenture-holder of the company, recovered judgment for the amount due on his debenture in February 1867. To this writ the sheriff returned *nulla bona*. A scheme of arrangement between the company and their creditors was afterwards filed under the above-mentioned Act, and the requisite consents having been obtained, was confirmed and enrolled on July 13, 1868. On September 24, 1869, Mr. Minor issued another writ of execution, under which the sheriff seized certain engines and rolling stock of the company. Thereupon the company, having obtained from the long-vacation judge an interim order to restrain the sheriff from selling the goods, gave notice of motion, under section 7 of the Act, for an injunction to restrain him from continuing longer in possession, and also to restrain Mr. Minor from taking further proceedings under his judgment; and Mr. Minor served a counter-notice of motion under section 9 for leave to make his execution available notwithstanding the scheme.

MALINS, V.C., before whom the matter came, made the order asked for by the company, and refused to give the leave asked for by Mr. Minor.

Mr. Minor appealed.

Mr. Glasse and *Mr. Locock Webb*, for the appellant, contended that his rights as a judgment creditor were not bound by the scheme. An injunction could only be granted upon bill filed.

Mr. Osborne and *Mr. Dryden*, for the respondents, referred to section 7 of the Act, as giving the Court jurisdiction to restrain all proceedings after the filing of the scheme.

GIFFARD, L.J., was of opinion that the extent of the jurisdiction of the Court, under clauses 7 and 9 of the Act, had been defined by Lord CAIRNS, L.J., in *re The Cambrian Railway Company's Scheme*, 37 Law J. Rep. (N.S.) Chanc. 409, and that they were only applicable while the scheme was maturing. After the confirmation and enrolment of the scheme the Court had no jurisdiction, without bill filed, to grant an injunction; and leave to make the process available was not necessary. Both applications ought to have been refused with costs. His LORDSHIP was of opinion, however, that Mr. Minor was bound by the scheme, and if a bill had been filed an injunction must have been granted. There would be no costs of the appeal.

LORD ROMILLY, M.R. Dec. 9. — *Re* POOLEY HALL COLLIERY COMPANY.

Directors—Indemnity—Borrowing Powers—Debentures.

A summons was taken out, in the winding-up of the above company, by certain debenture-holders to have the proceeds of the sale of the lease of a colliery applied in payment of the money due on the debentures.

The lease had been held by some of the directors in trust for the company. Those directors also claimed to have a first charge on the property for sums expended by them to prevent forfeiture of the lease and otherwise to preserve the property.

The debentures were issued under the sanction of a general meeting, as charged on the property of the company, but the borrowing powers of the company had been previously exhausted.

Mr. Roxburgh and *Mr. Rowcliffe* for the debenture-holders.

Sir R. Baggallay and *Mr. Higgins* for the directors.

Mr. Jessel and *Mr. Lindley* for the unsecured creditors.

Mr. C. Hall for the official liquidator.

The MASTER OF THE ROLLS decided that the debenture-holders had no priority. The directors had a priority for rent and such expenses as they had been obliged to incur.

LORD ROMILLY, M.R. Dec. 10. — CONSTANTINOPLE AND ALEXANDRIA HOTEL COMPANY. EBBETT'S CASE.

Company—Infant Allottee—Adoption of Contract.

This was an application to remove the name of Ebbett from the list of contributories. Ebbett had applied for shares while an infant; they were allotted to him in 1863; he came of age in April 1864. After the winding-up had commenced he executed a transfer of his shares.

Mr. Bagshawe for the application.

Mr. Bevir, for the liquidator, was not called upon.

The MASTER OF THE ROLLS refused the application, as the infant had adopted the shares after he had come of age.

LORD ROMILLY, M.R. Dec. 10. — *Re* CITY LIFE ASSURANCE COMPANY, *Ex parte* BRITTON ASSURANCE COMPANY.

Winding-up—Proof of Debt—Acquiescence.

By the articles of association of this company five persons were nominated the first directors, and the directors alone were to have the power of allotting shares. One of the five directors appointed never acted, and did not sign the memorandum of association.

The other directors passed a resolution not to carry on the business of the company, and to allot no shares. However, the managing director on his own responsibility allotted shares and appointed new directors, and business was carried on and policies were issued.

This was a claim on reinsurance effected by the Britton Company with the City Life Insurance Company. It was resisted by the three original directors who had not acted, on the ground that the whole business was carried on in a manner *ultra vires*.

Mr. Southgate and *Mr. Francis Webb* for the claimants.

Sir R. Palmer, Mr. Jessel, and *Mr. Ince* contra.

The Master of the Rolls admitted the claim to proof.

Lord Romilly, M.R. Dec. 2, 3, 10. } *In re* Gregg. *In re* Prance.

Solicitor—Payment of Costs Personally—Attachment—Regularity.

This was a motion to dissolve an attachment issued on behalf of Mr. R. H. Procter against Messrs. W. R. and H. A. Gregg, solicitors, of Kirkby Lonsdale, for disobedience to an order of the Court to deliver a bill of costs; and the motion also sought to make Mr. Prance (the solicitor of Mr. R. H. Procter, on whose behalf the attachment had been issued) to pay personally the costs of the proceedings. Several objections were raised to the regularity of the attachment.

1. The order was to deliver the bill on or before fourteen days after notice of the order. The order when first served had no indorsement as to attachment, and therefore no attachment could be issued on it; but it was argued on behalf of Messrs. Gregg that it constituted a notice from which the fourteen days would run. It was then served again with the endorsement more than fourteen days after the first service, and it was on this ground argued on behalf of Messrs. Gregg that it being impossible then to obey it no attachment ought to issue for disobedience.

2. It was said that when the attachment was issued, Mr. Prance knew that there was no bill to deliver, it having been already paid. This payment, however, was the alleged result of a transaction, which counsel for Mr. Procter denied to have this effect.

3. The date and contents of the affidavit on which the attachment was issued were a third ground of objection. The attachment was issued one month after the day on which the affidavit stating that the bill had not been delivered was sworn. This, it was suggested on behalf of Messrs. Gregg, was not sufficient evidence on which to issue an attachment, since the bill might have been delivered in the interval. It was not, however, suggested that the bill had been delivered. Indeed, the case of Messrs. Gregg was that it had not. As to the contents of the affidavit, it appeared that it was drawn in the common form.

4. The affidavit was sworn before a solicitor who acted as agent for Mr. Prance in serving the order.

The ground on which it was sought to make Mr. Prance pay the costs personally, was that Mr. Procter was quite incompetent to transact business, and that the whole proceedings were in fact the acts of Mr. Prance done in the name of Mr. Procter. All this, however, was denied on the part of Mr. Procter and Mr. Prance. Misconduct in other matters was also alleged against Mr. Prance.

Mr. Jessel, Mr. Lopez (of the Common Law Bar), and *Mr. Joyce* were for Messrs. Gregg.

Mr. Southgate and *Mr. Freeling* for Mr. Procter.

Mr. Roxburgh and *Mr. Prior* for Mr. Prance.

Dec. 10.—The Master of the Rolls held that the only ground upon which Mr. Prance could be made personally to pay the costs would be that he had been guilty of gross misconduct in these proceedings. This ground was not made out. His Lordship moreover regarded the objections made to the attachment as frivolous, and refused the motion with costs.

Lord Romilly, M.R. Dec. 11. } *In re* The Patent Paper Co. Addison's Case.

Winding-up—Contributory—Void Transfer—Condition Subsequent.

Mr. Addison had, in February 1859, applied to have 100 shares allotted to him on condition that he should be allowed to return them to the company, receiving back any sums he might have paid in respect of them, on giving one calendar month's notice any time before December 31, 1859. The shares were allotted to him by the directors on those terms, and his name entered on the register. He gave notice in the course of the year of his wish to return the shares, and a transfer was executed accordingly in January 1860 to a nominee of the directors. His name never appeared on the register after that date; but on the company being wound up in 1868 he was put upon the list of contributories on the ground that the condition was *ultra vires*.

Mr. Swanston and *Mr. Higgins* supported his application to have his name removed from the list on the ground that if the condition was illegal and void the allotment must be void also.

Mr. Jessel and *Mr. Jackson*, for the official liquidator, argued that this was not a condition precedent, as in *Pellatt's case*, 36 Law J. Rep. Chanc. 613; s. c. L. R. 2 Chanc. 527, but a condition subsequent, and therefore collateral, as in *Elkington's case*, 36 Law J. Rep. Chanc. 593; s. c. L. R. 2 Chanc. 517.

The Master of the Rolls took the same view, and dismissed the summons, but without costs.

Lord Romilly, M.R. Dec. 11, 18. { Commercial Bank Corporation of India and the East. *Ex parte* Fernandez.

Winding-up—Foreign Company—Probate Duty.

The above company was Indian, but having a branch in England, it was wound up in the Court of Chancery.

The personal representative of a deceased Indian shareholder had proved a debt. The Attorney-General opposed the payment of a dividend to him, on the ground that English administration ought to have been taken out, and probate duty paid.

Mr. Bagshawe for the claimant.

Mr. W. W. Karslake for the Attorney-General.

Mr. Baggallay and *Mr. Kekewich* for the official liquidator.

Dec. 13.—The Master of the Rolls said that it was not necessary to take out administration, and that as it was an Indian company the dividend must be paid.

Lord Romilly, M.R. Dec. 13. } Gilliatt *v.* Gilliatt.

Sale by Auction—Reserved Bidding—Puffer.

This was an adjourned summons, raising the question whether a proper sale had taken place under the decree of the Court in the following state of facts:—

The conditions of sale stated only that the sale was subject to a reserved bidding, which had been fixed by

the judge to whose Court the cause was attached. At the sale, however, a person was employed to bid up to the reserved price, and, besides him and the person who was declared the purchaser, there was no other bidder.

Mr. Jessel (*Mr. Whitehorne* with him) argued that the sale was void under the 30 & 31 Vict. c. 48.

Sir R. Baggallay (*Mr. Langworthy* with him) contended that the employment of a person to bid only up to the reserved price was justified, even under the old practice, by the language of Lord Cranworth in *Mortimer v. Bell*, L. R. 1 Chanc. 10, and the statute made no change in this respect. The Act expressly forbade the employment of a puffer only in the case of the sale being without reserve.

The MASTER OF THE ROLLS said that the Act required it to be stated in the conditions if any one of three things took place—if the land were sold without reserve, if it were sold subject to a reserved price, or if the right to bid were reserved. Here the right to bid was not reserved, and yet a puffer was employed. The result was that there had been no sale.

STUART, V.C. Dec. 10, 11. | *Re* THE UNIVERSAL BANKING CORPORATION (LIMITED). MACKRETH'S AND STRANG'S CASE.

Company—Contributory—Calls—Creditor—Assignment of Debt—Balance Order—Set-off—Duties of Official Liquidators.

This matter came on to be heard upon two adjourned summonses. The first was taken out on behalf of Mr. Mackreth to set aside a balance order obtained against him by the official liquidator of the company, in respect of a sum of 2,550*l.* (residue of a sum of 3,400*l.*) due from, and ordered to be paid by, him, for calls on 340 shares in the company. The second summons was taken out on behalf of the official liquidator, for liberty to set-off the amount to be paid to Mr. Mackreth as dividends on a debt of between 8,000*l.* and 9,000*l.* against the above-stated amount due from him to the company for the calls.

The facts of the case were shortly these:—

The company was incorporated under the Companies Act of 1862. Mr. Mackreth took the 340 shares in it, and advanced for it the above sum of about 9,000*l.* On June 22, 1866, an order was made to wind-up the company compulsorily. On December 20 in the same year Mr. Mackreth assigned his debt due to him from the company to Mr. Strang. On October 26, 1867, Mr. Mackreth executed a deed of arrangement with his creditors, and covenanted to pay them a composition of 1*s.* in the pound. In the schedule to that deed (which was duly executed and registered under the Bankruptcy Act, 1861) the official liquidator's claim for the 2,550*l.* was inserted as a debt due from Mr. Mackreth to the company. On June 16, 1868, Mr. Strang gave the liquidator notice of the assignment of the debt due from the company to Mr. Mackreth. On July 8 in the same year, the list of contributories of the company (including Mr. Mackreth) was settled. On July 16, 1868, Mr. Mackreth went to the official liquidator and tendered him the deed of composition, together with the sum of 127*l.* 10*s.* thereunder, as a full satisfaction of the 2,550*l.* Those tenders were refused. On November 27, 1868, a further call was made upon the contributories of 10*l.* per share. On January 16, 1869, the balance-order for the 3,400*l.* was made, and Mr. Mackreth paid (as was admitted) 850*l.* under it. On June 5, 1869, the list of creditors of the company was settled, including the name of Mr. Strang as the assignee of Mr. Mackreth's claim. No dividend had, however, yet been declared on the debts due from the company.

Mr. Dickinson and *Mr. A. Bathurst*, in support of Mr. Mackreth's summons, contended—(1) that either he had a right (notwithstanding his assignment of the 9000*l.* to Strang) to set off a portion of that sum against the claim of the official liquidator on him for the 2,550*l.*, because, inasmuch as Strang could only sue the company for the debt in the name of his assignor, the latter was still the legal owner of the whole debt; (2) or that the official liquidator was bound by the composition deed, and, having had the tender of the 127*l.* 10*s.* made to him, was, in fact, paid all to which he was entitled in respect of the 2,550*l.* The deed would have been a complete bar to an action at law by him against Mr. Mackreth for that amount.

Mr. Greene and *Mr. Brooksbank*, for the official liquidator, contended that, as Mr. Mackreth had assigned away his debt from the company, he could not set off any part of what was really the property of another man against the demand upon him for the calls as represented by the 2,550*l.* Moreover, as Mr. Strang stood in no better position than his assignor, he could not receive any dividend on the debt from the company till *all* the calls due from Mr. Mackreth had been paid to it; in other words, that the full amount of the calls should be deducted from the dividends.

STUART, V.C., said that Mr. Mackreth had no right to insist upon the set-off which he claimed, and that the balance-order must stand. The validity and effect of the composition deed was a question to be dealt with by the Court of Bankruptcy. This Court was not now administering the assets of Mr. Mackreth. With respect to Mr. Strang's position, the liabilities of his assignor attached to him; and the equities of all parties required that *all* that was due from Mr. Mackreth for calls to the company should be paid before Mr. Strang received any dividend on the amount claimed by him from the company. The VICE-CHANCELLOR made the following observations with reference to official liquidators and their duties: He said he intended to make all official liquidators, who had to conduct their business in his chambers, report to him, from time to time, upon the condition of the winding-up matters with which they were entrusted, stating in such reports the causes of any delays in the proceedings. He was at a loss to understand why any company should require three years' time to wind it up. No testator's estate, while administered by the Court, demanded so long a period. He had never yet seen a winding-up proceeding which had been conducted quite satisfactorily to his views. No doubt the Winding-up Acts gave official liquidators great opportunities for creating delays in the proceedings; but it was the duty of all official liquidators, who were the persons intrusted by the Legislature with the administration of the property of these companies, to discharge their duties as speedily, and with as little expense to all parties, as possible. He thought the same observations would equally apply to the administration of estates in bankruptcy. In no case ought official liquidators to seek occasions, by raising difficulties under the statutes—no doubt in themselves greatly capable of such effect—to cause delay and expense in the performance of their duties. They were bound to discharge them speedily

and cheaply; and having regard to the conduct of the official liquidator in this matter, he should reserve the question of his costs of these applications, in order that he might deal with them at the conclusion of the winding-up proceedings. The Vice-Chancellor directed that the order now made should not be drawn up till he had delivered judgment in the case of *The Bank of Hindustan, China, and Japan—Aspinall's case*, which was argued on the 4th instant.

Malins, V.C. Dec. 9. } Lee *v.* Haley.

Similarity of Trading Name—Wilful Confusion—Deception of Public—Injunction.

Motion to restrain the defendant from using the name of 'the Pall Mall Guinea Coal Company,' or any other name being a colourable imitation of that of the plaintiff's company, and calculated to deceive the public.

The plaintiffs were coal merchants carrying on business at 22 Pall Mall, under the style of 'the Guinea Coal Company.' The defendant had been their manager, but left their service in January 1869, and immediately set up an independent coal business under the style now complained of. The plaintiffs remonstrated with the defendant in March, whereupon the defendant added to his advertisement a note to the effect that he had no connection with the plaintiffs. This, however, was afterwards omitted. Evidence was produced of frequent mistakes made through the similarity of the names. The defendant had filed an affidavit alleging dishonesty on the part of the plaintiffs in their business during his service.

Mr. Osborne Morgan (*Mr. Cadman Jones* with him) for the motion.

The Vice-Chancellor called upon

Mr. Glasse (*Mr. Nalder* with him) to oppose it, but refused to hear the allegations of the plaintiff's dishonesty set up as a defence in the defendant's affidavit.

Mr. Osborne Morgan replied.

The Vice-Chancellor held upon the evidence that the defendant had adopted the style complained of, and done other acts with a view to create a confusion between himself and the plaintiffs to mislead the public, and thus to entrap the plaintiffs' customers. On that ground, apart from any question of trade-mark or property in a name, the plaintiffs were entitled to the injunction. As to the delay, part was accounted for, and for the remainder, it was caused by unwillingness to begin a suit in Chancery, for which the plaintiffs were not to suffer.

Malins, V.C. Dec. 11. } Dugdale *v.* Dugdale.

Administrator—Deficiency of Assets—Pecuniary Legatee and Residuary Devisee—Marshalling—Hensman v. *Fryer*, 37 *L. J. Rep.* 97.

Administration suit.

Testator by his will gave to his executors an advowson on trust to sell and pay his debts out of the proceeds; to his widow a legacy of 500*l.*, and also certain furniture and chattels of considerable value, and all his real estates to trustees upon the trusts in the said will stated.

The personal estate and the proceeds of the sale of the advowson being insufficient to pay the debts, legacies, and funeral expenses, it was proposed to insert into the decree a declaration that the deficiency should be raised and paid out of the specific legacy of 500*l.*, the specifically bequeathed chattels, and the real estate rateably in proportion to their respective values.

Mr. J. Pearson and *Mr. Bedwell* for the plaintiffs.

Mr. E. S. Ford for defendants.

The Vice-Chancellor said the proposed declaration could not be inserted in the decree; it was based on the decision with respect to marshalling in *Hensman* v. *Fryer*, which appeared to have gone on a misapprehension of the decision in *Tombs* v. *Roch*, 2 Coll. 502; but he should not now decide the question, which must be discussed later upon further consideration.

James, V.C. Dec. 8. } Parkes *v.* Stevens.

Practice—Costs of Issues—Apportionment where some Issues found for Plaintiff, others for Defendant.

In this suit, instituted to restrain the infringement of a patent, five issues were tried before the Court without a jury, as reported in 38 Law J. Rep. (N.S.) Chanc. 627, and on appeal *antè* 233; and of these issues the first four, relating to the novelty and validity of the patent, and to its being a proper subject for a patent, and to the sufficiency of the specification, were found for the plaintiff; the last, relating to the infringement, was found for the defendant. Hence the defendant was entitled to have the bill dismissed as against him with general costs. The only question was as to the costs of the issues, upon all of which evidence had been given.

Mr. Webster, *Mr. Kay*, and *Mr. Everitt* for the plaintiff.

Mr. Amphlett and *Mr. Bagshawe* for the defendant.

James, V.C., said he would deal with the costs as they would be dealt with in an action at law, where some costs were found for the plaintiff and others for the defendant. The bill must be dismissed, with general costs to the defendant, but the plaintiff to have the costs of the issues found for him.

James, V.C. Dec. 8. } Glover *v.* Moore.

Commission in the Army—Covenant to Assign Proceeds in futuro—Bankruptcy before Sale—Order and Disposition.

The object of this suit was to recover from the defendant the proceeds of the sale of the commission of an officer in the army. The officer, being then quartered at Quebec and being largely indebted to the plaintiff and other persons in Canada, on August 20, 1866, executed in Canada a deed whereby he assigned to the plaintiff for the payment of his creditors certain personal effects; and thereby, as a further security for the payment of his debts, he covenanted to make over to the plaintiffs the proceeds of his commission. In January 1867 the plaintiffs, by means of a letter written by the officer, gave notice to Messrs. Cox, the army agents in London, of the above-mentioned covenant: the commission had not then been sold. In August 1867 the officer was adjudicated a bankrupt in England, and the defendant was appointed his creditors' assignee. In October 1867 the commission was sold for 570*l.*, which was received by Messrs. Cox, and paid by them to the defendant. The defendant stated that he had received the same without notice of the plaintiffs' claim.

Mr. Amphlett and *Mr. Caldecott* appeared for the plaintiff.

Mr. Osborne Morgan and *Mr. Jemmett*, for the defendant, argued that the assignment of the commission to the

plaintiffs was imperfect and invalid as against the bankrupt's assignee.

James, V.C., said there had been a good equitable assignment of the commission, which, according to the authorities, was capable of being bound by such a covenant as this. A bankrupt's assignees could not take anything to which another person had a prior right. The order and disposition clauses in the Bankruptcy Act applied only where property was left in the possession of the bankrupt with the consent of the true owner. Here the plaintiffs had done all they could to complete the assignment, and were entitled to the decree they asked.

James, V.C. Dec. 8. } Chichester *v.* Lord Donegal.

Mortgagor and Mortgagee—Production of Deeds—Mortgagee's Right to withhold from Third Parties.

These were exceptions for insufficiency on the part of the plaintiff to the answer of two defendants, who were mortgagees under a power of mortgaging reserved by a certain indenture of settlement. The plaintiff, who claimed to have an estate limited to him by the same indenture of settlement, filed this bill for discovery and an account. He did not impeach the mortgage, but claimed a right to redeem it. The plaintiff had interrogated the defendants as to the execution date, names of parties, and purport of the settlement, which was in their possession under the mortgage. The defendants, by their answer, admitted that some such deed of settlement had been executed, but upon the ground that, as mortgagees, they were not bound to produce the deed or disclose the contents of it to the plaintiff until they had been paid their principal, interest, and costs, they declined to state what were the hereditaments comprised in the deed, or who were the parties to it, or what was the purport of it. Thereupon the plaintiff excepted.

Mr. Freeling supported the exceptions.

Mr. Amphlett and *Mr. Montague Cookson* were for the defendants.

James, V.C., said there was no magic in a mortgage which gave a mortgagee a better right than any other purchaser against third parties. Here the plaintiff claimed under a deed by which he said an estate was limited to him, and which was in the mortgagee's possession. The plaintiff had no right to any other deed; but the deed of settlement, to the extent of the plaintiff's interest, was part of the plaintiff's property. The exceptions, therefore, must be allowed.

James, V.C. Dec. 9. } Eade *v.* Morgan.

Practice—Hearing on Bill and Answer — Proceedings where Plaintiff does not Appear.

This cause was set down to be heard on bill and answer. When it was called on, plaintiff did not appear.

Mr. Caldecott appeared for the defendant, and asked to have the bill dismissed with costs in the plaintiff's absence. He produced no notice served by the plaintiff upon the defendant of the suit having been set down, nor any proof of service upon the defendant of a subpœna to hear judgment.

James, V.C., at first doubted whether he could make a decree dismissing the bill in the absence of such evidence or the non-production of such notice, but, on the cause being again mentioned to him the next day, he made the decree for dismissal of the bill; saying that, by setting down the cause to be heard on bill and answer, which the plaintiff alone could have done, the plaintiff had precluded the defendant from moving to dismiss the bill for the want of prosecution; therefore, the only course open to the defendant was to appear on the hearing and ask to have the bill dismissed with costs, and he was entitled to do so without any proof of service of a subpœna or notice.

James, V.C. Dec. 9. } Silver *v.* Udall.

Partition Suit—Statute 31 *&* 32 *Vict. c.* 40, *ss.* 5, 9—*Absence of Parties Entitled to Property.*

This was a suit to carry into execution the trusts of a settlement so far as related to leaseholds. The bill contained a prayer for sale or partition. The plaintiff was entitled to one equal tenth share of the leasehold property, which consisted of six houses in London; the defendant E. Silver was entitled to seven equal tenth shares of the property. It was stated that of the two remaining tenth shares one belonged to a person resident in New Zealand, and it was not known to whom the other belonged.

Mr. Hinde Palmer and *Mr. Crossley*, for the plaintiff, asked for a decree for sale.

Mr. Kay and *Mr. Dickins*, for the defendants, wished for a partition of the property, and contended that, at all events, no decree for a sale could be made in the absence of the parties entitled to the two last-mentioned shares.

James, V.C., said he should direct an inquiry whether any and what persons were interested in any and what shares other than that of the plaintiff and the defendant E. Silver, and if so whether such persons were out of the jurisdiction—adjourn further consideration. He thought he could have ordered the sale under section 5, in case of the absence out of the jurisdiction of any of the parties entitled, but he was not satisfied of the fact of such absence.

James, V.C. Dec. 11. } Baker *v.* Wait.

County Court—Transfer of Plaint.

This was an application for the transfer of a plaint to the Court of Chancery, on the ground that no substantial defendant was resident within the district of the County Court in which the plaint had been filed.

The only defendant alleged to reside in the district was in the same interest as the plaintiff.

Mr. Locock Webb for the application.

Mr. Ford contra.

The Vice-Chancellor directed a transfer of the plaint.

Courts of Common Law.

Queen's Bench. Magistrates' Case. Nov. 6, Dec. 13.

THE COMMISSIONERS FOR ADMINISTERING THE LAWS FOR RELIEF OF THE POOR IN IRELAND (APPELLANTS) *v.* THE SELECT VESTRY OF LIVERPOOL (RESPONDENTS).

Irish Poor—Removal of Wife Deserted by her Husband—8 & 9 Vict. c. 117, s. 2.

Case stated under 12 & 13 Vict. c. 45, s. 11.

At a petty session held at Liverpool on May 28, 1867, a warrant for the removal of Ellen Keating and her two children from the parish of Liverpool to the union of Tullamore, Ireland, was granted by two justices of the said borough.

Ellen Keating, the wife of John Keating, and the said children, being their legitimate issue and unemancipated, were admitted into the Liverpool workhouse as the known wife and children of John Keating on September 30, 1867, and there remained until removed under the above-mentioned warrant.

John Keating was born in Ireland, but not within the Tullamore union; nor had he resided for three years within the said union. Ellen Keating was born within the Tullamore union, and both of her children were born in Ireland.

On October 31, 1867, the respondents obtained a warrant against John Keating for having, on September 30, 1867, deserted his said wife and children, leaving them chargeable to the parish of Liverpool; and on September 17, 1868 (being after the appeal was entered at the Liverpool Borough Quarter Sessions and after the same was respited to the next Quarter Sessions), he was convicted of the said offence.

At the time of granting the warrant of removal, and up to the time of his apprehension on September 17, 1868, John Keating lived and resided in Hull in Yorkshire, and the respondents did not at the time of obtaining the order of removal know where he was to be found.

Mellish (*L. Temple* with him) for the appellants.

G. Francis for the respondents.

Cur. adv. vult.

The judgment of the COURT was now delivered by COCKBURN, C.J., against the validity of the removal, on the ground that the statute contemplated the removal of the whole family, and made no provision for the case of a woman deserted by her husband.

Judgment for the appellants.

Queen's Bench. Dec. 13. DAWKINS *v.* PAULET.

Libel—Army—Military Discipline—Soldier—Letters—Reports made by Commanding Officer.

This was an action for libel.

The declaration set out two letters written by the defendant, who was the Major-General commanding the brigade of Foot Guards, to the Adjutant-General. These letters enclosed and commented upon certain other letters sent to the defendant by the plaintiff, who was a captain in the Coldstream Guards, forming part of the brigade of Foot Guards, and which the plaintiff required the defendant, as his superior officer, to forward to the Adjutant-General.

The defendant pleaded that when he wrote and published the letters, he was an officer in Her Majesty's army holding the public office, or appointment, of Major-General commanding the brigade of Foot Guards, and was the superior military officer of the plaintiff; that it was the defendant's duty as such superior officer to forward to the Adjutant-General certain letters written and sent to the defendant, as such superior officer, in relation to their military conduct, duties, and qualifications by the officers under his command, and to make thereupon and in relation thereto, for the information of the Commander-in-Chief, reports in writing to the said Adjutant-General on the subjects of such letters. That the defendant, as such superior military officer and Major-General commanding as aforesaid, had received from the plaintiff certain letters in relation to the military duties of the plaintiff, and to certain orders received by the plaintiff as such officer, and to his conduct, in which letters the plaintiff requested that the same should be forwarded to the Adjutant-General; that thereupon the defendant, in the ordinary course of his military duty as such superior military officer and Major-General commanding as aforesaid, and because it became and was necessary and incumbent upon him by his duty to Her Majesty so to do, and as an act of military duty and not otherwise, or for any other reason, forwarded the said letters to the said Adjutant-General, and for the information of the Commander-in-Chief, made certain reports in writing in relation to the said letters, and to certain military orders therein referred to, and with respect to the plaintiff's conduct as such officer in relation to the said orders, and to the plaintiff's incompetence and unfitness as an officer; that such reports were in the form of letters addressed to the Adjutant-General, being the proper officer to receive such letters and reports, which were forwarded upon an occasion, being the proper occasion according to the discipline and regulations in force in Her Majesty's army, for the defendant to make such reports in writing, and which are the letters complained of.

Replication that the words in the declaration mentioned were written and published by the defendant of actual malice on his, the defendant's part, and without any reasonable, probable, or justifiable cause, and not *bona fide*, or in the *bona fide* discharge of defendant's duty as such superior officer, as alleged.

Demurrer and joinder in demurrer.

The demurrer was argued by

The *Attorney-General* (*Sir R. P. Collier*), the *Solicitor-General* (*Sir J. D. Coleridge*), (*Dowdeswell* and *Archibald* with him), for the defendant; and by

A. S. Hill (*Holl* with him) for the plaintiff (June 1).

Cur. adv. vult.

MELLOR, J., now delivered judgment in favour of the defendant, holding that the plaintiff had no remedy in a Court of law. His LORDSHIP stated that the late Mr. Justice HAYES concurred in this judgment. He also read the judgment of Lush, J., to the same effect.

COCKBURN, C.J., delivered judgment for the plaintiff.

Judgm

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Privy Council. Dec. 6. THE OWNERS OF THE VELOCITY (APPELLANTS) *v.* THE OWNERS OF THE CARBON (RESPONDENTS).

Present: Lord CHELMSFORD, Sir J. COLVILE, and Sir J. NAPIER.

Admiralty—Sailing Rules, No. 14—*Interpretation—Vessels Crossing.*

This was an appeal from a decree of the judge of the High Court of Admiralty in a cause of damage, instituted by the owners of the Carbon against the Velocity and the General Steam Navigation Company, her owners, for the recovery of damages caused by a collision between the Carbon and the Velocity.

The collision occurred on September 8, 1868, in the river Thames a little below Millwall Pier. The Carbon, a screw steamer laden with a cargo of coals, was proceeding up the river to London; and the Velocity, a screw steamer with a cargo and passengers, was going down the river, bound for Calais. Each of the vessels had her proper lights up.

On the part of the Carbon it was alleged that the masthead and red or port lights of the Velocity were seen at the distance of about a quarter of a mile from and bearing a little on the starboard bow of, the Carbon, and that this being a position involving risk of collision, the helm of the Carbon was put to port, and her engines soon afterwards were stopped and reversed, and that the Velocity improperly starboarded her helm.

On the part of the Velocity it was alleged that the green light of the Carbon was seen at the distance of about a quarter of a mile from and bearing about two points on the starboard bow of, the Velocity, that there was no danger of collision, and that the Carbon improperly ported. It was admitted, on the part of the Velocity, that her helm was starboarded, but it was alleged that such starboarding was effected for the purpose of running her ashore in order to save life.

On the part of the Carbon it was contended that, having the Velocity on her starboard side crossing her, she was bound, under Rule 14, to keep out of her way, and that porting was a proper measure to take; and that, under Rule 18, the Velocity ought to have kept her course.

The learned judge of the Court below, being assisted by two of the Elder Brethren of the Trinity Corporation, was of opinion that the two vessels were crossing each other within the meaning of Rule 14 of the Steering and Sailing Rules, and that the Velocity was solely to blame, and decreed accordingly.

Mr. Millward, Mr. Butt, and *Mr. Cohen* for the appellants.

Dr. Deane and *Mr. Clarkson* for the respondents.

Lord CHELMSFORD delivered the judgment of their LORDSHIPS: Their LORDSHIPS are of opinion that this was not a case in which Article 14 of the Sailing Regulations was applicable. In their LORDSHIPS' judgment the Velocity and the Carbon were not crossing within the meaning of Article 14. Their LORDSHIPS are also unable to discover that any degree of blame can be attributed to the Velocity. They will therefore recommend that the decree be reversed, with costs.

Privy Council. Dec. 14. THE SOUTH AUSTRALIAN INSURANCE COMPANY (APPELLANTS) *v.* WILLIAM BEAVIS RANDELL AND ANOTHER (RESPONDENTS).

Present: Lord CHELMSFORD, Sir J. COLVILE, Sir J. NAPIER, Sir R. PHILLIMORE, and Lord Justice GIFFARD.

South Australia—Contract of Bailment—Rights of Bailee.

This was an appeal from a judgment of the Supreme Court of the province of South Australia, discharging a rule obtained by the appellants, to set aside a verdict for the plaintiffs in an action brought by the respondents against the appellants, and instead thereof, to enter the verdict for the appellants pursuant to leave reserved.

The appellants are an insurance company carrying on business in the province of South Australia, and having their principal place of business at Adelaide. The respondents are millers carrying on business at Blumberg.

On July 4, 1866, the respondents applied to the appellants to insure the current stock in their mill, namely, wheat, flour, sacks, &c., to the amount of 1,250*l.* against loss or damage by fire, and on the same day an insurance was effected in the terms of such application, and subject to the conditions endorsed on the policy. One of the conditions was as follows:—'Goods held in trust or on commission must be insured as such, otherwise the policy will not extend to cover them.' On February 17, 1867, a fire occurred, whereby the respondent's mill, with the stock therein, was destroyed. A claim was made by the respondents for the loss; but the amount being disputed, an action was commenced by them to recover the value of the stock.

The respondents declared upon the policy, and the appellants pleaded (amongst other things) that the respondents were not interested in the stock, and also that, in their proposals for the insurance, they represented that the stock was to be insured for themselves, whereas it was held by the respondents in trust for other persons. Issue was joined on the pleas, and the action was tried before the Chief Justice and a jury on September 10 and 17, 1867. Upon the trial it was admitted by the respondents that the stock which had been destroyed by the fire had been paid for by the appellants, except such portion as they alleged was held by the respondents in trust for others; and the question was, whether such portion (consisting of wheat) was held by the respondents in trust for others, within the meaning of the condition, and was therefore not covered by the policy.

The evidence showed that, according to the respondents' course of business and previous dealings, wheat was received by them from farmers to whom such course of business and dealing was known, and was on receipt shot out of bags into hutches, where it became

mixed with other wheat which had been received in a similar manner, and on part of which advances had been made to the farmers by the respondents. The wheat thus mixed lost its identity, and became the current stock of the respondents, which, according to their course of dealing, known to the farmers, was either sold as wheat by the respondents or ground in their mill. If ground, the flour produced from such stock was sold and otherwise dealt with by the respondents The farmer could demand an equal quantity of wheat of like quality with that delivered by him to the respondent, or the market price of equal quantity, fixing the price as of the day on which he made his demand. The respondents had the option of delivering wheat of like quality, or paying such market price. The wheat in question had been brought by farmers to the respondents in manner aforesaid, and in the said course of business, and had been mixed with other wheat, and treated in the manner aforesaid, and a portion of it had been paid for by the respondents. No evidence was adduced on the part of the appellants, but their counsel applied for a nonsuit on the ground that the wheat was held in trust, and was not the property of the respondents. The Chief Justice declined to nonsuit the respondents, and by consent the verdict was entered for them for 698*l.*, with leave to the appellants to move to enter a verdict for them if the Court should be of opinion that the wheat so taken on storage was held in trust within the terms of the conditions in the policy.

A rule *nisi* was obtained by the appellants, to set aside this verdict, and to enter a verdict for the appellants, pursuant to leave reserved, upon the ground—1. That the goods stored had not been assured by the respondents; 2. That the wheat taken on storage was held upon trust within the terms of the conditions of the policy. This rule came on to be argued, and was discharged. From this judgment the present appeal was brought.

Mr. Pollock and *Mr. Thesiger* for the appellants.

Mr. Mellish, *Mr. Macnamara*, and *Mr. Way* for the respondents.

Sir J. NAPIER delivered the judgment of their LORDSHIPS: Their LORDSHIPS are of opinion that the judgment of the Supreme Court was right. Their LORDSHIPS think that the property in the wheat was transferred by the bailment to the miller, and that the wheat was not therefore included in the condition in the policy as 'goods held in trust,' but was part of the current stock insured against loss or damage by fire in the terms of the policy of assurance. Their LORDSHIPS will therefore recommend Her Majesty that the judgment be affirmed.

Courts of Equity.

LORD HATHERLEY, L.C. Dec. 14, 15. } BRUCE *v.* GARDEN.

Policy of Assurance—Property in—Debtor and Creditor.

Certain debts being due from a Major Bruce to the defendant, an army agent, the latter effected policies of assurance on the life of the former, and paid the premiums. It appeared from an account kept by the defendant that he entered the premiums as debts due from Major Bruce, and on one occasion drew on the latter bills for an amount more than large enough to include these premiums so paid as well as the rest of the debt due to him. It did not, however, appear that the account in which the premiums were charged against Major Bruce had ever been communicated to him. On Major Bruce dying intestate in 1861, when the debt due to the defendant was 1,874*l.* 10*s.* 8*d.*, the defendant received the moneys on the policies to the amount of 3,150*l.* Major Bruce's administrator claimed the surplus after satisfying the debt; but the defendant insisted that the policies were his exclusive property. JAMES, V.C., made a decree on June 25 last, to the effect that, in taking the account of what was due to the defendant, he must be charged with the moneys received on the policies.

The defendant appealed.

Mr. Willcock and *Mr. L. Field* were for the appellant; and

Mr. Amphlett and *Mr. R. Horton Smith* for the plaintiff.

The LORD CHANCELLOR said that, in the absence of any proof that Major Bruce had been aware that the premiums were charged against him, he felt bound by the authorities to dismiss the bill, though without costs. To have entitled the debtor's estate in this case to policies on the debtor's life, there should have been distinct evidence, he thought, of a contract for the creditor to pay, and for the debtor to allow the premiums.

LORD HATHERLEY, L.C., Dec. 17. { *Re* CONTRACT CORPORATION (LIMITED). EBBW VALE COMPANY'S CLAIM.

Winding-up—Debts carrying Interest.

By an order of the MASTER OF THE ROLLS, dated April 26, 1869, and made in the winding-up of the Contract Corporation, the Ebbw Vale Company were admitted creditors of the Corporation for a sum of about 8,000*l.*, together with interest at 5 per cent., to the date of the order.

Mr. J. W. Chitty now applied for leave for the Corporation, notwithstanding that the three weeks allowed by section 124 of the Companies Act 1862 had elapsed, to enlarge the time for appealing until December 31.

He grounded his application on the fact that the Lords Justices had (*In re Humber Ironworks and Shipbuilding Company. Warrant Finance Company's case*, L. R. 4 Chanc. 643) on June 1 last, decided that, in all cases of the winding-up of insolvent companies, creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest at the winding-up.

Mr. Jessel and *Mr. Huish*, for the Ebbw Vale Company, contended that the decision of the Lords Justices was not retrospective, that the order was drawn up in accordance with the practice in the chambers of the Master of the Rolls previous to the decision of the Lords Justices, and that it was now too late to ask for leave to appeal.

His Lordship considered that the Lords Justices in the decision referred to had declared what the law in such cases was, and that the construction which they put on the Act was a general construction, and not merely for the future; as this order, therefore, had been drawn up under a practice which the Lords Justices had declared to be erroneous, there would be leave to appeal, and with the consent of all parties his Lordship varied the order by giving interest on the debt to the date of the winding-up only.

Giffard, L.J. } *In re* Hollyford Copper Mining
Dec. 11. } Company (Limited).

Companies Act 1862, *s.* 122—*Enforcing in England Orders made in Ireland.*

This was an application to enforce a call made by the Court of Bankruptcy of Ireland (in which Court the company was being wound up, see section 81), against certain persons resident in England.

Mr. Lindley for the applicant, the official liquidator.

Giffard, L.J., thought that under section 122 of the Companies Act 1862 there was jurisdiction to make the order of the Court of Bankruptcy of Ireland an order of the English Court of Chancery.

Giffard, L. J. } *Re* Spencer.
Dec. 11, 18. }

Practice in Equity—Mistake—Neyligence of Solicitors—Costs.

This was a petition presented in lunacy, and in the matter of the Trustee Relief Act, and in several other matters, for the purpose of setting to rights a mistake which had been made in reference to certain funds in Court, which had been paid out under an order of the Lords Justices made in 1867, upon the supposition that they formed part of the estate of one Mary Spencer, a lunatic.

It appeared that upon the occasion of the committee intending to pass some account, Messrs. Hawkins, the London agents of the solicitors of the committee, applied to the Accountant-general for certificates of the amount of certain funds then standing in Court belonging to the lunatic. In answer to which application four certificates were issued (three only being applied for), one of the amount of 331*l.* 15*s.* 4*d.* consols, and 38*l.* 18*s.* 6*d.* cash, to the account of the trusts of the will of Mary Spencer deceased, which Mary Spencer was a wholly different person (the lunatic being in fact then alive). These certificates were handed in without examination to the master's office; and before the report was finally settled by the committee, the latter changed his solicitors and employed Mr. G. W. Crook, one of the present respondents. This gentleman appeared to have assumed that the fund in question belonged to the lunatic as coming from her sister Sarah Spencer, deceased. And subsequently a petition was presented containing an allegation that the account was by mistake wrongly entitled 'Mary' instead of 'Sarah' Spencer, deceased. Upon this petition the order above-mentioned was made and the fund paid out to Mr. Halestrap, the representative of the lunatic, who was then dead, the cash being paid to other parties. The owners of the fund now sought to have it replaced, with interest, and also to make the persons who had thus wrongfully deprived them of the fund pay all the costs and expenses connected with the present application. The petition was served not only upon Mr. Halestrap and the persons who had received the cash, but also upon Mr. Crook and the various other solicitors.

Mr. Charles Hall and *Mr. Joyce* for the petitioners.

Mr. Bagshawe for Mr. Crook and the persons who were the petitioners in 1867.

Mr. Lindley for Mr. Halestrap and his solicitors.

Mr. Wickens for Messrs. Hawkins & Co.

Mr. W. Pearson for the trustees of the fund.

His Lordship held that there had been no *mala fides* in the transaction, but only gross negligence. It being admitted that the fund must be replaced, he had to decide the question of costs, and held that all the clients of Mr. Bagshawe and Mr. Lindley were jointly and severally liable, but in different respects. Mr. Halestrap was primarily liable to replace the consols, and the persons who received the cash to replace that, with interest. Mr. Crook was primarily liable for the costs and expenses. Messrs. Bloxam & Co. were not liable for costs, inasmuch as they had merely committed an error which ought to have been rectified, but the rectification of which was not in their power. They would, however, receive no costs.

Giffard, L.J., } Lee *v.* Hayley.
Dec. 18. }

Similarity of Trading Name—Deception of Public—Injunction.

This was an appeal from the order of Malins, V.C., noted *ante*, p. 270.

Mr. Glasse and *Mr. Nalder* for appellant.

Mr. Osborne Morgan and *Mr. Cadman Jones*, for the respondent, were not heard.

His Lordship dismissed the appeal, with costs.

Lord Romilly, M.R. } James *v.* Lichfield.
Nov. 9, Dec. 3. }

Specific Performance—Vendor and Purchaser—Abatement—Tenancy—Notice.

The defendant had agreed to sell to the plaintiff certain land and houses, and in the letter by which he accepted the plaintiff's offer to purchase he said, 'I agree to deliver to you the said property as freehold.' One of the houses and a part of the land were subject to agreements for a lease for twenty-one years from Christmas, 1867, at a rent less than their present value. The plaintiff knew that this house and land were in the occupation of a tenant, but he did not know how large the tenant's interest was, and he filed the present bill for

specific performance of the agreement, with an abatement of the purchase money.

Mr. Southgate and *Mr. Waller* appeared for the plaintiff.

Sir R. Baggallay and *Mr. W. Cooper* for the defendant.

Dec. 3.—The MASTER OF THE ROLLS held that the plaintiff having notice that the house and land in question were in the possession of a tenant, ought to have ascertained the nature of the tenant's interest, and was not entitled to any abatement of the purchase money.

LORD ROMILLY, M.R. } THE LAND CREDIT COMPANY
Dec. 2, 4. } OF IRELAND *v.* FERMOY.

Practice—Order to Pay—Fi. Fa.—Service.

This was a motion to set aside a writ of *fi. fa.* In the suit, the object of which was to fix the directors of the plaintiff company with personal liability, an order had been made declaring the defendants jointly and severally liable to pay a sum of money, and ordering them to pay it on or before June 30, 1869. This order had not been served on the defendant Munster, but a writ of *fi. fa.* had been issued against him. This was a motion on behalf of the defendant Munster to set aside the writ on the ground that the order had not been served, and that it ought not to have been issued against the defendant Munster alone, but against all the defendants ordered to pay.

Mr. Jessel and *Mr. Hemming* for the motion.

Sir R. Baggallay and *Mr. Shebbeare* contra.

Dec. 4.—The MASTER OF THE ROLLS refused the motion on the ground that it was not the practice to serve orders for payment of money on a fixed day, and that the defendants being severally liable the writ might issue against any one of them.

LORD ROMILLY, M.R. } *In re* W. A. NORVALL.
Dec. 2, 7. }

Attachment—Actual Knowledge of Order—Commencement of Action.

This was a motion to commit Mr. Norvall for disobedience to an order inhibiting him from commencing any action. The order was made on August 9 last. It was not served personally, and it did not come to his knowledge till August 19. On August 14, however, he had entered an action in the Lord Mayor's Court, but all the subsequent proceedings in the action had been taken since the 19th.

Mr. Jessel and *Mr. Speed* were for the motion.

Mr. Southgate and *Mr. Bagshawe* contra.

Dec. 7.—The MASTER OF THE ROLLS held that Mr. Norvall was not bound by the order till August 19, when he became personally aware of it, and that since it did not restrain him from taking any subsequent proceedings in an action then begun, he had not been guilty of disobedience to it. His Lordship refused the motion.

LORD ROMILLY, M.R. } WALL *v.* ROGERS.
Dec. 4, 11. } WALL *v.* OGLE.

Married Woman—Compromise of Suit.

This was a petition for the compromise of two suits relating to the reversionary interest in personal estate under a settlement of a married woman, who was a joint plaintiff with her husband. The petition was presented by the plaintiffs, and the question was whether the compromise would bind the married woman.

Mr. Jessel and *Mr. D. Jones*, for the petitioners, argued that the compromise would be binding.

Mr. Stirling, for the trustee of the settlement, suggested that the bill should be amended by making the husband a defendant, and the wife plaintiff by her next friend.

Mr. Jessel contended that this could not be done, since the property was not settled to the separate use of the wife.

Dec. 11.—The MASTER OF THE ROLLS directed that the petition should be amended by making the wife a respondent, to appear separately from her husband, and held that the order on the petition so amended would bind the married woman.

LORD ROMILLY, M.R. } DEARE *v.* SOUTLEN.
Dec. 15. }

Husband and Wife—Desertion—Money Lent to Wife to Pay for Necessaries—Liability of Husband to Repay.

The plaintiff had lent money to a married woman to enable her to pay for necessaries during the time when she was living apart from and deserted by her husband, and the money had been applied by her in procuring necessaries. This was a bill to compel the husband to repay the money, there being no remedy at law. Under a decree in a separate suit the dividends of certain stock had been ordered to be paid to the wife for her maintenance, but the advances in respect of which the present suit was instituted were all made before any of those dividends became payable.

Mr. Archibald Smith appeared for the plaintiff.

Mr. Idle for the defendant.

The MASTER OF THE ROLLS said that *Jenner* v. *Morris* (3 De G. F. & J. 45; 30 Law J. Rep. (N.S.) Chanc. 361), cited by Mr. A. Smith, distinctly overruled *May* v. *Skey* (16 Sim. 588; 18 Law J. Rep. (N.S.) Chanc. 306), cited by Mr. Idle, and decreed that the defendant should repay to the plaintiff the sums in question.

LORD ROMILLY, M.R. } *In re* HEYFORD COMPANY (LIM.)
Dec. 18, 20. } FORBES AND JUDD'S CASE.

Company—Contributory—Memorandum of Association Signed in respect of Paid-up Shares.

This was an application by summons to remove the names of Mr. Forbes and Mr. Judd from the list of contributories. The company was formed for the purchase of an iron mine from Mr. Pell. The consideration for the purchase-money was to be 7,000*l.* and 1,500 fully paid-up shares of 20*l.* each, and on default by the company in payment of the 7,000*l.*, Mr. Pell was to be at liberty to resume possession of the mine. The agreement embodying these terms was stated in the articles of association.

Mr. Pell subscribed the memorandum of association for 1,350 shares (part of the 1,500); Mr. Forbes for 50 shares (being also part of the 1,500 given to him by Mr. Pell); Mr. Judd for 50 under the same circumstances, and another gentleman for 50 more, thus making up the whole 1,500. Besides these, 22 shares were subscribed for by other persons, these being the only shares in respect of which the subscribers intended to render themselves liable to calls. The 7,000*l.* not having been paid, Mr. Pell had resumed possession of the mine.

Under these circumstances Mr. Forbes and Mr. Judd

had been settled on the list of contributories on the ground that by signing the memorandum of association they had contracted to become liable as contributories in respect of the number of shares written opposite to their names.

Mr. Westlake, for Mr. Judd and Mr. Forbes, relied on *Pell's case*, 8 L. R. Eq. 222, and *Drummond's case*, 4 L. R. Chanc. Ap. 772.

Mr. Roxburgh, for the official liquidator, relied on *Migotti's case*, 4 L. R. Eq. 238, which he admitted he could not distinguish from the cases cited by Mr. Westlake.

Dec. 20.—The Master of the Rolls dismissed the summons with costs. His Lordship admitted that the authorities cited could not be reconciled, and expressed a hope that the case would come before the Lord Chancellor, insisting that the real question was whether the requirements of sections 8 and 23 of the Companies Act 1862 would be satisfied by signing the memorandum of association in respect of paid-up shares, and was to be decided by the construction of those sections.

V.C. Stuart. Dec. 8. } Fenwick *v.* Bullman.

Vendor and Purchaser—Specific Performance—Bill by Sub-Purchaser—Demurrer by Original Vendors Overruled.

By an agreement dated Sept. 4, 1863, T. W. & G. R. Bullman contracted to sell to W. Wilson, a builder, certain lands near Newcastle-on-Tyne, and gave to Wilson the option of taking a neighbouring plot of land at 300*l.* an acre; W. Wilson was to build upon the lands, and to be at liberty to enter thereon for that purpose, paying a monthly rent or interest until completion. He exercised his option, took the plot, and was let into possession of it. By an agreement dated March 3, 1866, W. Wilson contracted to sell to J. R. Fenwick two acres of the said plot for 600*l.*; and by another agreement of the same date W. Wilson undertook to execute certain buildings thereon for Fenwick. Fenwick's solicitor then prepared a conveyance of the plot, which was approved on behalf of W. Wilson and of the Messrs. Bullman, and was subsequently executed and retained by the latter. A dispute having arisen between Fenwick and W. Wilson as to the amount due in respect of the buildings executed by W. Wilson for Fenwick, W. Wilson refused to execute the conveyance until his charges were paid. W. Wilson was adjudicated bankrupt in June 1868, and J. Stephenson was appointed his creditors' assignee. Fenwick tendered to Messrs. Bullman the purchase-money for the plot, together with so much by way of rent or interest as he considered to be due, provided the Messrs. Bullman would hand over to him the conveyance of the plot, and he offered to indemnify them against liability. Messrs. Bullman, however, declined to do so, on the ground of the pendency of a suit by them against the assignee of W. Wilson and one T. Wilson, who claimed to be an incumbrancer of W. Wilson, to which suit Fenwick was subsequently made a party, for specific performance or rescission of the original agreement. Fenwick accordingly filed his bill against the Messrs. Bullman, the assignee of W. Wilson, and against T. Wilson, the alleged incumbrancer, praying for specific performance of the agreement of March 3, 1866, and of so much of the agreement of September 4, 1863, as related to the said plot of land, and that the Messrs. Bullman might be ordered to deliver to him the said conveyance, the plaintiff offering to pay all moneys properly payable to entitle him thereto.

To this bill the defendants, Messrs. Bullman, demurred.

Mr. Greene and *Mr. Davey* for the demurrer: The Messrs. Bullman were not parties to Fenwick's contract, and are not proper parties to this suit. Fenwick was only made a party to Messrs. Bullman's suit to show that they had a right to rescind in his presence.

Mr. Dickinson and *Mr. A. G. Marten*, for the bill, were not called on.

Stuart, V.C., overruled the demurrer.

Stuart, V.C. Dec. 18. } Staight *v.* Burn.

Light and Air—Application by Plaintiffs whilst Altering their Premises—Injunction Refused.

The plaintiffs, who were ivory cutters near Hatton Garden, moved to restrain the defendants, who were bookbinders in Kirby Street, from erecting a wall so as to darken, injure, or obstruct their ancient lights or windows, or to prevent the free access of light and air to their premises. In opposition to the motion the defendants produced evidence to show that the plaintiffs themselves were building so as to alter their own lights.

Mr. Dickinson and *Mr. E. W. Collins* in support of the motion.

Mr. Greene and *Mr. Hemming* contra.

Mr. Dickinson in reply.

Stuart, V.C.—This is a new case. It is well decided that the Court will not interfere by injunction upon every violation of the legal right in these cases, for there must be a material deprivation of the easement; but it is a mistake to suppose that unless the Court interferes the legal right is gone. In this case the plaintiffs appear to be acting in such a manner as to render it impossible to know to what extent they are qualifying their rights, or to what extent their ancient lights will ultimately be retained. The Court cannot interfere to protect a legal right without knowing what that right is, and under these circumstances, beyond refusing the injunction, I shall make no order whatever upon this motion.

Malins, V.C., Dec. 17, 18. { *Re* The General Company for Promotion of Land Credit. *Ex parte* Bos and Dubourg. *Re* Same. *Ex parte* The International Land Credit Company.

Winding-up—Companies Act—Creditor's Petition—Foreign Company—Discretion of Judge.

The petitions in this matter were presented by creditors to obtain an order to wind up the General Company for the Promotion of Land Credit, and it was admitted that, if the company were an English one, there was no ground for opposing either petition. They were opposed, however, by the holder of twenty fully paid-up shares, on the ground that the company was wholly a foreign company, all of whose shareholders and officers were foreigners resident abroad, whose meetings were held at Brussels, whose business was wholly conducted there, and whose entire property was situate abroad. The company, however, had been regis-

tered in England under the Companies Act 1862, and had a registered office in London to meet the requirements of that Act, where the register of shareholders and a few other books of the company were kept under the care of one clerk as agent of the company.

Mr. Glasse and *Mr. Waller* for the first petition.

Mr. Fry and *Mr. Hill* for the second petition.

Mr. Bond Cox for another creditor; and

Mr. Locock Webb, for the company, supported the petitions.

Mr. Cotton and *Mr. Kekewich*, for the shareholder, opposed.

MALINS, V.C., considered the company to be wholly a foreign company, such as was not within the contemplation of the Legislature when they passed the Companies Act of 1862; that it ought never to have been registered thereunder, and that such registration did not make it an English company so as to compel him to make an order to wind it up, even on the petition of a creditor. He considered he had a discretion under section 79 of that Act, and exercising that discretion, and believing that an attempt to wind-up the company here would do more harm than good, he dismissed the petitions.

MALINS, V.C. Dec. 20. } BOWYER *v.* GRIFFIN.

Costs of a Defaulting Trustee who has Executed a Creditor's Deed.

Bill to make the defendant accountable as a defaulting trustee. On hearing of the plaintiff's intention to file a bill, defendant executed a creditor's deed, which was duly registered. On the following day the bill was filed. This was a petition for the appointment of a new trustee in defendant's place. Defendant did not oppose the petition, but asked for his costs, as of a trustee become bankrupt before bill filed.

Mr. Batten, for the defendant, contended that in all cases where trustees had been brought before the Court who had become bankrupt before the bill was filed, they had received their costs as between solicitor and client.

Mr. Archibald Smith, on the other side, contended that the rule applied only to trustees who were also executors; there was no case in which it had been applied to a defaulting trustee.

Mr. Glasse and *Mr. Cracknall*, for plaintiff Bowyer, defendant's co-trustee, said that the plaintiff had agreed to make up the whole defalcation of the defendant, including the necessary costs of suit, but objected to pay defendant's own costs.

MALINS, V.C., said he must follow the authorities, with which he also agreed. The bill here had been filed after the registration of a creditor's deed, which for this purpose was of the nature of a bankruptcy. The claim was for a mere money demand, and should therefore have been made against the trustees of the deed; the defendant had divested himself of all property, and it was therefore useless to go against him. So far, therefore, as the bill was for the purpose of establishing this money demand, it was unjustifiable; so far as it was to remove the defendant trustee from his office, it was right; but in that case he would still be entitled to his costs, being brought before the Court as a necessary party. Therefore, even had it been *res integra*, he must have held the defendant trustee entitled to all his costs incurred since his bankruptcy as between solicitor and client.

MALINS, V.C. Dec. 20. } *In re* BRADFORD NAVIGATION COMPANY.

Winding-up—Parties Entitled to Oppose Petition—Companies Act 1862.

Petition by the company that they might abandon their undertaking and be wound up, on the ground that they had ceased working for three years. The Air & Calder Canal Company and the Town Council of Bradford appeared to oppose, being interested in the maintenance of the company on its present basis.

Mr. J. Pearson (*Mr. G. Hastings* with him), for the Bradford company, contended that neither of the opposing parties were creditors or contributories of this company, and they were not therefore entitled under the Companies Act 1862 to appear on the petition for winding-up.

The VICE-CHANCELLOR, without calling on the other parties, held that in this peculiar case, the petitioners undertaking being a canal which formed a continuous line of navigation with the Leeds and Liverpool Canal and the Air & Calder Canal through the town of Bradford, the two canal companies and the corporation of Bradford had a sufficient interest to entitle them to appear and oppose the petition.

MALINS, V.C. Dec. 21. } COX *v.* 'LAND AND WATER' JOURNAL COMPANY.

Newspaper—Property in Contributed Articles—Registration—Piracy—Copyright Act 1842.

Motion in a suit to restrain defendants from publishing in their journal a list of packs of hounds, with particulars concerning the same, called 'The Hunting List of 1870,' taken or colourably altered from a similar list, called 'The List of Hounds,' published in the plaintiff's newspaper, the *Field*.

The defendants took the preliminary objection that there was no copyright in articles of a newspaper, or if there was copyright, that the matter must be registered under the provisions of the Copyright Act 1842 (5 & 6 Vict. c. 45), in order to enable the proprietor to sue upon the piracy of it.

Mr. Glasse and *Mr. Brooksbank* for the plaintiff.

Mr. J. Pearson and *Mr. Loudon* for defendants.

MALINS, V.C., held on the authorities that, if not copyright, there was at least property in articles contributed to a newspaper and paid for sufficient to enable the proprietor to maintain an action, both on the general principles of property and under section 18 of the Act. He also held that a newspaper did not come within the definition of a 'book' given in section 2 of the Act, and therefore was not a publication that required to be registered in order to bring its proprietor within the protection of the Act. But the information here alleged to have been pirated being of an ephemeral nature, he should not grant an interlocutory injunction; and he intimated that at the hearing he should not grant an injunction, but should send it into Chambers for inquiry as to damages.

MALINS, V.C. Dec. 20. } *In re* THE TIMES LIFE ASSURANCE CO. *Ex parte* MARIA CHESSHYRE.

Winding-up—Practice—Petition by Creditor—Withdrawal of Petition after Payment of Petitioner's Debt—Costs.

Petition by the holder of a policy of 100*l.* now due for the winding-up of this company, which had been

amalgamated with the Albert Life Assurance Company. The petition was presented on December 1, and served upon Mr. Sheridan, formerly the managing director of the company. On the 13th Mr. Sheridan, on behalf of the company, offered to the petitioner payment of the amount due on the policy, together with all costs incurred up to that date in the matter. She, however, refused the offer, on the ground that having advertised the petition she was bound to carry it on to the hearing; otherwise she would be liable for the costs of any parties who might appear upon the day of hearing in consequence of her advertisement.

A provisional liquidator had been appointed in the matter.

Mr. Glasse and *Mr. Solomon* for the petitioner.

Mr. Roxburgh and *Mr. N. Higgins*, for the company and Sheridan, asked that the petition might be dismissed with costs.

Mr. Speed for other creditors of the company.

Mr. Cole and *Mr. Lindley* for the provisional liquidator.

Mr. J. Pearson for the official liquidator of the Albert.

The VICE-CHANCELLOR refused to assent to the doctrine that a petitioner could not withdraw his petition on satisfaction of his debt; and the respondent still offering to pay to the petitioner the amount due on the policy, together with costs up to the date of the first offer, and the costs unavoidably incurred by the provisional liquidator, refused costs to all other parties, and made no order on the petition.

JAMES, V.C., Dec. 15. } ELMSLIE *v.* BOURSIER.

Injunction—Patent—Infringement—Importation from Abroad of Patented Manufacture.

This was a suit to restrain the infringement of a patent. The patent in question, which was for improvements in machinery or apparatus for the manufacture of sheet tin, was taken out in March 1859, and assigned by the original patentees to the plaintiffs in 1861. The bill alleged that upon that assignment it was understood that the plaintiffs should have the exclusive right of selling in England tinfoil manufactured according to the patented invention. In 1865 the defendant purchased the manufactory and business in France of Masson, the original patentee of the invention. The contract between Masson and the defendant referred to the English patent as having been already sold by Masson, and excepted it out of the sale to the defendant, but gave the defendant rights of patent and importation elsewhere than in England. The defendant had imported into England for sale tinfoil manufactured by him in France according to the patented process. This bill was filed to restrain such importation and sale as being in fact an infringement of the plaintiffs' rights under the assignment of the patent to them.

Mr. Grove and *Mr. W. N. Lawson*, for the plaintiffs, were stopped by the Court.

Mr. Willcock and *Mr. Locock Webb* for the defendant.

JAMES, V.C., said there was a clear violation of the plaintiffs' rights. It would be a strange thing if a man, after parting with all his rights over the patent in England, were enabled to destroy the benefits of the grant of the patent here by selling his process in France for importation into this country of the goods manufactured under it. He must grant the injunction.

JAMES, V.C. Dec. 6. } JARROLD *v.* HEYWOOD.

Injunction—Copyright—Fair Use of Similar Work.

The plaintiffs were the publishers of a book called 'Brewer's Guide to Science,' constructed on the principle of explaining natural phenomena in popular language by way of question and answer (see *Jarrold* v. *Houlston*, 3 K. & J. 708). The defendants were the publishers of a similar work called 'The Class-book of Science.' The complaint was, that in the part of the latter work which dealt with the same subjects—the chief merit of both works being in the questions—291 questions out of 314 had been borrowed substantially from the former work, though arranged in quite a different order to conceal the piracy. The defendants' authors admitted that they had been using the 'Guide to Science' for many years in tuition, and they had used it—among some fifty other books, which were produced and referred to in Court—to assist them in compiling their own book.

Mr. Kay and *Mr. Westlake* for the plaintiffs.

Mr. Fry and *Mr. F. C. J. Millar* for the defendants.

JAMES, V.C., considered that it was impossible to sustain a charge of literary piracy, where you had to track the passages complained of through hundreds of pages, and therefore having to decide the matter as a jury held that the defendants' authors had not made an unfair use of the plaintiffs' work.

JAMES, V.C. Dec. 17. } FREEMAN *v.* POPE.

Voluntary Settlement—Intent to Defeat Creditors—Stat. 13 Eliz. c. 5—Rights of Subsequent Creditor.

On March 3, 1863, the Rev. J. Custance, rector of Blickling and Erpingham, in Norfolk, being then indebted to his bankers and other creditors to a considerable amount, executed three deeds. The first was a bill of sale of his furniture to secure a sum of 350*l.* then advanced to him by his housekeeper Mrs. Walpole, and expended by him in payment of some of his debts. The second was a surrender for value of certain copyhold land, the proceeds of which were also expended in paying his debts. The third deed was a voluntary settlement in favour of his goddaughter Mrs. Pope of a policy of insurance for 1,000*l.* on his own life. Mr. Custance, in addition to the income derived from his said two livings, which together produced about 815*l.* per annum, had also an annuity of 180*l.* per annum. Subsequently, his living was sequestrated for his debts. He died in April 1868, aged eighty years. At the time of his death all his debts which had existed in March 1863 had been paid off, with the exception of about 111*l.* still due to his bankers; but at his death he owed fresh debts to a considerable amount, contracted subsequently to the deed of settlement, and he died without assets. The plaintiff, who was one of such subsequent creditors, thereupon filed this bill to have the voluntary settlement of the policy set aside as being a fraudulent settlement, coming within the statute 13 Eliz. c. 5, and made with the intent to defeat or delay the settlor's creditors.

Mr. Kay and *Mr. Cozens Hardy*, for the plaintiff, argued that in cases of this kind the Court must judge

of the intent of the settlor by the actual results. The plaintiff, although a subsequent creditor, could maintain this suit, since there were prior creditors whose debts were still unpaid.

Mr. H. Fellows, for the administrator of the debtor, supported the plaintiff's contention.

Mr. Osborne Morgan and *Mr. H. A. Giffard*, for the defendants, contended that there was here no such disparity between the amount of debts and the means of the settlor as would lead to an inference of fraud on his part.

JAMES, V.C., said upon the facts of this case he should have come to the conclusion that the settlor, in making this settlement, had no intention to defraud his creditors. But he was bound by two decisions—*Jenkyn* v. *Vaughan*, 25 Law J. Rep. (N.S.) Chanc. 338, and *Spirett* v. *Willow*, 34 Law J. Rep. (N.S) Chanc. 365, which decided that where a creditor prior to the deed remained unpaid, a subsequent creditor had the same right as such prior creditor to impeach the validity of the deed, and that the right of the prior creditor to relief depended, not upon the question of the solvency or insolvency of the debtor at the date of the deed, but upon the ultimate effect of the deed in defeating or delaying the creditor. He must therefore hold that the plaintiff was entitled to have this deed set aside.

JAMES, V.C.
Dec. 20. } INGRAM *v.* UPPERTON.

Production of Documents—Privilege—Counsel's Briefs—Endorsements and Notes—Plans Attached—Extracts from Ancient Records.

This suit related to the rights to a certain foreshore, and this was an application on behalf of the plaintiff for the production of certain documents mentioned by the defendant (who was chief clerk to the Shoreham Harbour Commissioners) in his affidavit as to documents, and which he claimed to be privileged. These documents consisted of (1) plans attached to the briefs of counsel upon proceedings before the referees and a committee of the House of Commons relative to the passing of a Bill by the Harbour Commissioners; (2) counsel's endorsements and notes of evidence upon their briefs in the proceedings before the referees; (3) memoranda relating to and extracts from ancient records of the town and manor of Old Worthing, procured by the Commissioners for the purposes of their defence to an action.

Mr. Waller appeared for the plaintiff in support of the application.

Mr. Lindley, for the defendant, did not resist the production of the endorsements and notes of evidence on the briefs, everything else in them being sealed.

JAMES, V.C., said plans might be as much in the nature of instructions to counsel as a description in words, and they were accordingly privileged documents. The memoranda relating to the ancient records were also clearly privileged; and as to the extracts, he could not allow a man to see what his adversary's solicitors had prepared for his defence. Costs to be costs in the cause.

JAMES, V.C.
Dec. 21. } ALCOCK *v.* GILL.

Affidavit as to Documents—Further Affidavit—'Reasonable Suspicion'—'Pleadings and Affidavits.'

Adjourned summons. The plaintiffs had by their bill sought discovery as to certain documents from the Great Western (of Canada) Railway Company. Their secretary had made an affidavit to the effect that the documents had come into his possession in his former character of secretary to another company, consequently that he was not at liberty to produce them.

Mr. Kay and *Mr. Chitty*, for the plaintiffs, applied for an order requiring him to make a further affidavit, on the ground that he had since stated on oath, while being examined *ex parte* in the same cause, that he held the documents in question as secretary of the Great Western Railway Company.

Mr. Fry and *Mr. J. Kaye*, for the defendants, were not heard.

JAMES, V.C., referred to the remark of SELWYN, L.J., in *Wright* v. *Pitt*, L. R. 3 Chanc. 809, to the effect that the 'reasonable suspicion' which could justify such an order must be a suspicion founded on the pleadings and affidavits. This must mean the answer and affidavits in which the original statement is contained; as, *e.g.*, if the answer referred to 'the four documents mentioned in the schedule,' and the schedule only three. Application refused with costs.

JAMES, V.C.,
Dec. 21. } DREW *v.* DREW.

Statute of Frauds, s. 17—Earnest.

This was a claim made against the estate of a deceased timber merchant, which was being administered in the Court of Chancery.

The deceased had given one Maley, a builder, orders on a dock company to deliver certain timber to bearer. Maley had given the delivery orders to the claimant to secure the due payment of bills discounted by him. The bills were dishonoured. No notice of the existence of the delivery orders was given to the dock company, and no notice of the assignment was given. The representative of the deceased sold the timber, and the holder of the orders sought to prove for the net value of the timber.

One ground for resisting the claim was that the contract was void under section 17 of the Statute of Frauds, but it was alleged that acceptances had been given by Maley.

Mr. Graham Hastings, for the claimant, argued that the giving the bills of exchange, though they were subsequently dishonoured, would be sufficient part payment within section 17 to render the contract valid.

JAMES, V.C., said the Court did not bear out that proposition, but he thought the giving the bills of exchange was a giving of something by way of earnest.

Mr. Pitcairn, against the claim, was not called upon.

The VICE-CHANCELLOR directed that the claimant, being the mere assignee of a contract without notice given to the company, could not prove against the estate of the deceased.

JAMES, V.C.
Dec. 15, 16, 22. } DUGDALE *v.* MEADOWS.

Succession Duty—Jointure—Resettlement of Estates with Power of Sale Subject to Jointure—Sale under Power—Exoneration of Purchaser—Specific Performance.

This was a vendor's suit for specific performance. By the marriage settlement of Sir Robert and Lady Bromley, made June 6, 1812, certain real estates then belonging to Sir Robert Bromley were limited to Sir

Robert Bromley for life, with remainder to the intent that Lady Bromley should receive thereout a jointure of 1,650*l.* per annum, with remainder to trustees for a term of ninety-nine years to secure the said jointure, with remainder to the first and other sons of the marriage successively in tail male, with remainder to Sir Robert Bromley in fee. In August 1851 the estate tail under this settlement was barred by Sir Robert Bromley and the plaintiff, Sir Henry Bromley, his eldest surviving son, and a resettlement of the estates was made, whereby limitations were created to Sir Robert Bromley for life, with remainder to the plaintiff, Sir Henry Bromley, for life, with remainder to his eldest son, with remainder to his issue male in strict settlement, with remainders over; and the deed of settlement contained a power of sale, authorising the trustees to sell the said settled estates, with the consent of the tenant for life for the time being, and with a trust to invest the moneys arising from any such sale in land to be settled upon the same uses and trusts as the land sold. Sir Robert Bromley died July 8, 1857. In June 1864 the settled estates were put up for auction by the trustees, with the consent of the Dowager Lady Bromley, the jointress, and Sir Henry Bromley, and one lot was knocked down to the defendant. The defendant's solicitor insisted that before completion the succession duty payable on the extinction of Lady Bromley's jointure must be paid by the vendors and the receipt produced. The plaintiff's solicitors refused to comply with this requisition, and, after considerable delay and correspondence, the defendant gave notice to the plaintiffs of the rescission of his contract, and commenced an action at law for the recovery of his deposit. The plaintiffs then filed this bill to enforce the defendant's contract to purchase and restrain the action.

Mr. Kay, *Mr. Osborne Morgan*, and *Mr. Byrne*, for the plaintiffs, argued that this case came within section 42 of the Succession Duty Act, that the purchaser could never be liable to pay the duty, which would be a charge on the substituted estates.

Mr. Eddis and *Mr. Waller* for the defendant.

JAMES, V.C., said he was of opinion there was no foundation for the purchaser's objection. The question was clearly disposed of by section 20 of the Succession Duty Act, by which the duty was to be assessed upon the successor or any person in his right or on his behalf entitled in possession to his succession. In this case the purchaser, who had purchased from the trustees and not the successor, was not a person on whom any duty could ever be imposed, for he was not the successor or a person entitled to the succession. This very question appeared to have been anticipated by the framers of the Act in section 42. Under that section the substituted land to be purchased under the trusts of the settlement would be charged with the duty. He must therefore make a decree for specific performance.

Courts of Common Law.

Queen's Bench. Dec. 18. } LONGBOTTOM *v.* BERRY AND ANOTHER.

Fixtures—Mortgage—Bill of Sale.

This was a special case raising the question whether certain machinery and articles necessary for adapting a mill for the business of a woollen manufacturer passed to the mortgagee under an equitable mortgage and subsequent conveyance to him as purchaser.

The owner and occupier of the land upon which the mill was built was one Kershaw, who, in the year 1862, deposited the title deeds relating to the same with the defendants, who were bankers, to secure the balance of his account with them. The defendants continued to hold the deeds as such security until August 1866, when the land and premises were conveyed to them. After the deposit, and before the year 1865, Kershaw built a mill upon the land, which he fitted with engines and machinery, and he also put in such machinery as was necessary for the purposes of his trade of a woollen cloth manufacturer. The machinery was, in general, firmly fixed to the floor, roof, or side walls of the building in 'a *quasi* permanent manner,' viz. by screws or bolts, or soldered with lead. Without being fixed in such manner they could not have been effectually used; but there were also articles which were mere movable chattels. By a bill of sale, dated January 18, 1865, in consideration of a sum of money advanced to him by the plaintiff, Kershaw assigned to the plaintiff 'all the machinery, fixtures, implements, utensils, effects, and things,' mentioned in a schedule, and including all the machinery and articles, the ownership of which was in question in this case. At the time of making the bill of sale the plaintiff knew of the deposit of the title deeds. On August 25, 1866, the land, premises, machinery, &c., were conveyed to the defendants, the plaintiff not acquiescing in such conveyance.

The question was whether the plaintiff or the defendants were entitled to such machinery and articles.

The case was argued (April 27) by

Mellish (*Macleod* with him) for the plaintiff; and by

Manisty (*Macrory* with him) for the defendants.

Cur. adv. vult.

The judgment of the COURT (LUSH, J., HANNEN, J., and HAYES, J.,) was now delivered by HANNEN, J. Under the equitable mortgage and the conveyance the machinery and articles which were fixed to the building

in the manner stated in the case passed to the defendants, and the plaintiff cannot claim them under the bill of sale. *Hellawell* v. *Eastwood*, 6 Exch. 295; s.c. 20 Law J. Rep. (N.S.) Exch. 154, which was a case between landlord and tenant, does not apply to the question whether machines fixed by an owner of the soil pass to a mortgagee of the freehold. With regard to such articles as are merely movables, our judgment is that they would pass to the plaintiff under the bill of sale.

Judgment accordingly.

Probate and Matrimonial Causes.

Probate. Dec. 14. } GRANT *v.* GRANT.

Will—'I appoint my said Nephew, Joseph Grant, Executor'—Probate claimed by Nephew of Testator's Wife and Son of Testator's Brother of Same Name—Evidence Admitted to Explain Intention.

John Grant, late of Rugby, in the county of Warwick, innkeeper, died on February 22, 1868, having made his last will and testament on February 18, 1868. The will contained the following clause:—'I bequeath to my nephew, Joseph Grant, the sum of five hundred pounds, &c., &c. I appoint my said nephew, Joseph Grant, executor of this my will.'

Probate of the instrument was claimed by Joseph Grant, a nephew of the testator's wife, who had been brought up by them, and who had assisted the testator in his business for many years; and by Joseph Grant, a son of the testator's brother. The case was heard on November 26, and the question was whether the evidence was admissible to show that the person intended by the testator was the wife's nephew, or whether the Court was bound to exclude that evidence and grant probate to Joseph Grant, the brother's son, the defendant.

Field (with him *Dr. Middleton*) for the plaintiff.

Dr. Swabey (with him *Chapman*) for the defendant.

LORD PENZANCE (on Dec. 14) delivered judgment. Having detailed the facts of the case, his LORDSHIP continued: It is contended that the word 'nephew' cannot possibly be construed to include the nephew of the testator's wife. It is said that the Court is bound by the primary signification of words used in a will, and that nothing but the primary signification in its strictest sense can be resorted to unless that signification would produce some absurdity or render the meaning insensible. A proposition of this kind is, no doubt, to be found in Sir James Wigram's book; but a great deal turns upon the question, what is meant by the expression 'primary signification.' It will not do to carry it too far. When a man makes a will it is fair to presume that he uses ordinary language in its ordinary sense, and if the original signification of a word is scrupulously followed in all cases, to the exclusion of that which by the common consent and use of mankind it has in process of time acquired, the Court would be carried in some cases a long way from the testator's intention in the endeavour strictly to follow it. Furthermore, the use and custom of particular counties and places affix to certain words particular meanings. Evidence of such meanings has always been permitted in the construction of written contracts, and why not in that of a will? Another thing has to be considered when the Court is dealing with a personal description. It may be that the testator has been in the habit of applying a particular designation to an individual. And if the evidence may be referred to, it is plain in this case that the testator did constantly use the word 'nephew' to designate his wife's nephew. It may be that the word 'nephew,' when used as the sole description of a class who are to take benefit under a will, must be construed to include only the sons of brothers or sisters of the testator, and in one of the cases cited it appears to have been so construed. But this does not appear to me to preclude a wider signification being attached to the word when used as an additional description of a person specified by name, to whom the word is in an ordinary and popular sense applicable. Upon the whole, then, I am of opinion that so much of the evidence as shows the relation and circumstances in which the respective parties stood to the testator, and the sense in which he habitually used this word 'nephew' when referring to Joseph Grant, his wife's nephew, is admissible as placing the Court in the position of the testator, and thus enabling it to understand the meaning of his language. And the Court construes the appointment of executor to have been intended to apply to Joseph Grant, the nephew of testator's wife. Probate granted to plaintiff accordingly. No order as to costs.

Divorce and Matrimonial Causes. Dec. 14. } LETTS *v.* LETTS.

Wife's Petition—No Appearance by Respondent in Suit—Decree Nisi—Respondent Allowed to Appear on Taxation of Costs—Practice.

The wife filed her petition for dissolution of marriage on the ground of bigamy and adultery. The respondent, having no defence, did not make an appearance in the suit. A decree *nisi* for dissolution of the marriage was granted on November 18, and the respondent was condemned in costs.

Searle, for the respondent, now moved that he might be allowed to enter an appearance in order that he might attend the taxation of costs before the registrar.

The COURT granted the application.

High Court of Admiralty.

Admiralty Court. Dec. 3, 4, 21. } THE HEART OF OAK.

Mortgage—Fraudulent Preference.

This vessel was arrested in a cause of mortgage, asserting the validity of two mortgages dated respectively January 4 and 8 last. The defendant was assignee of the bankrupt owner, and denied that any money was due to the mortgagee at the time when the mortgages were executed, and that the mortgages were invalid, as given by way of fraudulent preference, and to defeat or delay payment to the owner's creditors.

Butt and *Pritchard* appeared for the plaintiff.

Giffard and *Cohen* for the defendants.

Sir R. PHILLIMORE, having at great length examined the evidence, the cases cited, and the general law upon this subject, said he was of opinion that these mortgages fell under the category of a fraudulent preference to a particular creditor, inasmuch as by means of them an assignment was made by the trader of his effects, with only a colourable exception, in contemplation of bankruptcy; and because such assignment was made without any present equivalent, the effect of it was to delay and defeat the equal distribution of his effects among all his creditors. The Court pronounced against the validity of the mortgages, and dismissed the petition of the mortgagee, with costs.

Admiralty Court. Dec. 9, 21. } THE NORTHUMBRIA.

Limited Liability—Vessel not under Arrest—Jurisdiction.

This was a question as to the jurisdiction of the Court, and arose out of a suit to limit the liability of the owners of the Northumbria in respect of a collision with the Hesperia.

The case had been before the Court on a previous occasion as to the period from which interest should accrue from the wrongdoer; and since then a question was raised as to the jurisdiction of the Court, inasmuch as the vessel was not technically under arrest at the time of the institution of the suit for limitation of liability. The section of the Admiralty Court Act, 1861, which gives the Court jurisdiction, is as follows (s. 13):—'Whenever any ship or vessel, or the proceeds thereof, are under the arrest of the High Court of Admiralty, the said Court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act, 1854.'

Butt and *Steavenson* appeared for the Northumbria.

E. C. Clarkson for the Hesperia.

Gainsford Bruce for the owners of the cargo of the Hesperia.

Sir R. J. PHILLIMORE: In the present case the vessel has not been under arrest, because the owners, under rule 55 of this Court, took out a *caveat* warrant, and offered to give bail. Bail having been given, the formal warrant of arrest became unnecessary. Stripped of these technicalities, the plain meaning of this language is this:—The defendant says to the plaintiff, 'Don't arrest my ship; I will consent to give that bail which would have released my ship if the warrant had been served upon her.' There can be no doubt, I think, what was the intention of the Legislature in the section to which I have referred—namely, that whenever the Court was seized of the 'res,' the jurisdiction as to limitation of liability should attach. The bail is the representative of the 'res,' and to all intents and purposes the Court is as much seized of the possession as if the 'res' itself had been under warrant of arrest and released. According to the old practice, the jurisdiction of the Queen's Bench was in certain cases only founded on the fact of the defendant being in the custody of its marshal; but this principle was holden to be satisfied by the defendant's appearance, or by his putting in bail, 'for,' as Mr. Smith observes, 'in those cases, though not in the real, he was in the constructive custody of the marshal (Action at Law, ed. 1857, p. 7). And surely, in the case before me, the 'res' is in the constructive, though not in the real, custody of the marshal of the Court. But even if this analogy be unsound, which it does not appear to me to be, I should still be of opinion that, looking to the whole scope and tenor of the Act, the jurisdiction of this Court was intended to be founded in suits of this description, when it is in possession of the bail which represents the 'res,' whether the 'res' has been released in the giving of bail after the arrest, or whether the arrest has been prevented, as in this instance, by such a *caveat* as has been issued in this case.

Decree accordingly.

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